Supreme Court, U.S.
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No. 08-655

# In the Supreme Court of the United States

HARRAH'S OPERATING COMPANY, INC.,
a Delaware corporation,

*Petitioner,*

v.

NGV GAMING, LTD.,
a Florida partnership,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1 U.S.C. § 1, a portion of the "Dictionary Act", states in pertinent part:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise –
>
> * * *
>
> words used in the present tense include the future as well as the present;

In recent months, this aspect of the Dictionary Act has featured prominently in two opinions wherein the United States Ninth and Second Circuit Courts of Appeals have considered virtually identical statutory definitions of the phrase "Indian lands," yet reached opposite conclusions. Each statute defines "Indian lands" to include lands the title to which "is held by the United States in trust for an Indian tribe". *Compare* 25 U.S.C. § 81(a) *with* 25 U.S.C. § 2703(4). Each statute serves the important purpose of providing federal agency review of contracts with Indian tribes so as to ensure that Indian tribes are protected from organized crime elements and other unscrupulous actors.

In a 2-1 decision, the Ninth Circuit concluded that Section 81's definition of "Indian lands" means only land currently held in trust and not land that contracting parties intend to place in trust in the future. In so doing, the Ninth Circuit found that Section 81 is unambiguous, and, therefore, 1 U.S.C. § 1's command that words used in the present tense include the future tense did not apply. Thus, the

Ninth Circuit declined to construe Section 81's definitional language of land that "is held by the United States in trust for an Indian tribe" to include land that "will be held in trust." According to the panel dissent, the majority's "existing trust lands only" interpretation of Section 81 creates a mechanism for creating contracts that encumber Indian lands while evading the statutory review requirements.

Less than four months later, the Second Circuit expressly relied upon 1 U.S.C. § 1's present tense includes future tense rule to construe Section 2703(4)'s definition of "Indian lands" to include land that "will be held in trust." In so doing, the Second Circuit expressly disagreed with the Ninth Circuit's contrary construction of the phrase "Indian lands," opining that the Ninth Circuit's narrow interpretation of "Indian lands" would thwart Congress's intent to have pertinent federal agencies oversee contracts for the purpose of promoting the best interests of Indian tribes.

The questions presented are:

1. Does the Dictionary Act's rule that words used in the present tense also include the future tense, unless the context indicates otherwise, only apply if the statutory text at issue is ambiguous?

2. Does the term "Indian lands" as used in 25 U.S.C. §§ 81 and 2701-2721 include both land that "is held by the United States in trust for an Indian tribe" and land that "will be held in trust by the United States for an Indian tribe"?

## LIST OF PARTIES

The parties to this proceeding are those listed in the caption.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Harrah's Operating Company, Inc. is a wholly owned subsidiary of Harrah's Entertainment, Inc., a privately held corporation. No publicly held company owns 10% or more of the stock of either Harrah's Operating Company, Inc. or Harrah's Entertainment, Inc.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Harrah's Operating Company, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App.1-51) is reported at 531 F.3d 767. The decision of the district court (App.52-60) is reported at No. C 04-3955-SC, C 05-1605-SC, 2005 WL 5503031.

## JURISDICTION

The judgment of the court of appeals was entered on June 26, 2008, with Judge N. Randy Smith filing a dissenting opinion. App.1-51. On July 7, 2008, the Ninth Circuit granted Petitioner an extension of time to file a petition for rehearing and rehearing *en banc*, and Petitioner filed its petition for rehearing and rehearing *en banc* on July 17, 2008. App.61-62. On August 13, 2008, the petition for rehearing was denied. App.63-64. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

## RELEVANT STATUTORY PROVISIONS

1 U.S.C. § 1 provides in pertinent part:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise –
>
> * * *
>
> words used in the present tense include the future as well as the present;

25 U.S.C. § 81 provides in pertinent part:

> (a) Definitions
>
> In this section:
>
> (1) The term "Indian lands" means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.
>
> * * *
>
> (b) Approval
>
> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

25 U.S.C. § 2703 provides in pertinent part:

For purposes of this chapter--

* * *

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.

(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term "Indian lands" means--

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

* * *

(10) The term "Secretary" means the Secretary of the Interior.

25 U.S.C. § 2711 provides in pertinent part:

(a) Class II gaming activity; information on operators

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the

> operation and management of a class II gaming activity that the Indian tribe may engage in under section 2710(b)(1) of this title ....
>
> * * *
>
> (h) Authority
>
> The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission.

## STATEMENT

### 1. Statutory Overview.

This petition concerns issues of statutory construction involving portions of three Congressional Acts. The first is the Dictionary Act, 1 U.S.C. §§ 1-8, a Congressional enactment that supplies "rules of construction for all legislation." *Ngiraingas v. Sanchez*, 495 U.S. 182, 190 (1990) (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 719 (1978) (Rehnquist, J., dissenting). Originally enacted in 1871, the current version of the Dictionary Act was revised and recodified in 1947. The pertinent Dictionary Act provision in this case is the rule governing the use of verb tense in statutes, and provides as follows:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise --
>
> * * *

> words used in the present tense include the future as well as the present . . .

1 U.S.C. § 1.

The second Congressional enactment implicated by this petition is 25 U.S.C. § 81. Originally enacted in 1871, Section 81 was substantially revised in 1999 with the revisions taking effect in 2000. Congress originally enacted Section 81 "to protect the Indians from improvident and unconscionable contracts...." *In re Sanborn*, 148 U.S. 222, 227 (1893). Accordingly, the original Section 81 incorporated a series of protective measures, specifically requiring the Secretary of the Interior to approve any of a large variety of contracts between a non-Indian and an Indian tribe including any contracts "relative to [Indian tribal] lands."

The revised Section 81, however, significantly pared back the number and type of contracts requiring Secretarial approval. As of 2000, Section 81 now provides, in pertinent part, as follows:

> (b) Approval
>
> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

25 U.S.C. § 81(b).

Under revised Section 81, the term "Indian lands" is defined as follows:

> The term "Indian lands" means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

25 U.S.C. § 81(a).

The legislative history behind the 2000 amendments explains that, "by making this change, Section 81 will no longer apply to a broad range of commercial transactions." S. Rep. No. 106-501 at 9. Rather, the revised Section 81 "will only apply to those transactions where the contract between the tribe and a third party could allow that party to exercise exclusive or nearly exclusive proprietary control over the Indian lands." *Id.* But Congress rejected an Executive Branch proposal to eliminate Section 81 altogether. *Id.* Instead, Congress elected to retain the requirement of Secretarial approval "to address a limited number of transactions that could place tribal lands beyond the tribe's ability to control the lands in its role as proprietor." *Id.*

The third congressional act implicated by this petition is the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 (2006), which provides a detailed regulatory framework for Indian gaming. Among other purposes, Congress enacted IGRA to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments," while simultaneously "shield[ing tribes] from organized crime and other corrupting influences [and] ensur[ing] that ... Indian tribe[s] [are] the primary beneficiar[ies] of ... gaming operation[s]."

25 U.S.C. § 2702. To conduct gaming, an Indian tribe must satisfy numerous prerequisites. These include the requirement that the gaming take place "on Indian lands ...." 25 U.S.C. § 2710(b)(1)(A). As pertinent, IGRA defines "Indian lands" as follows:

> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4)(B).

**2. The Proceedings Below.**

On July 3, 2002, the Guidiville Band of Pomo Indians ("the Tribe") entered into a series of contracts with F.E.G.V. Corporation to develop and construct a proposed gaming facility on land the Tribe hoped would be restored as trust land in Northern California. App.4, 54. Respondent is the assignee of these contracts. *Id.* The agreements consisted of a Development Agreement and Personal Property Lease ("Lease") and a Cash Management Agreement ("CMA"). *Id.* Respondent was obligated under these agreements to assist the Tribe in identifying and purchasing land in order to establish the trust land base on which the gaming facility would eventually be built. App.54. There is no dispute that these agreements purported to encumber the Tribe's trust lands for a period of seven or more years. For example, the Lease states

that the Tribe could not without Respondent's consent:

> Sell, dispose of, lease, assign, sublet, transfer, mortgage or encumber (whether voluntarily or by operation of law) all or any part of its right, title, or interest in or to the Trust Lands, the Facility, or the Equipment.

App.5.

In addition, the agreements granted Respondent and its agents a right of entry, providing them with "complete and unrestricted access to the Indian trust lands for purposes of developing, installing and constructing the Structure." App.45. Notwithstanding these encumbrances, Respondent maintained in the proceedings below that Section 81 Secretarial approval was not required for the Lease and CMA because the Indian trust lands on which the gaming facility was to be developed had not been acquired at the time these agreements were executed. App.56.

On August 2, 2004, the Tribe sent Respondent a letter rescinding the CMA and Lease. App.6. Also in August 2004, the Tribe entered into an agreement with Petitioner and Upstream Point Molate, LLC ("Upstream") to develop and manage the Tribe's proposed gaming facility. App.7-8. Ultimately, however, the Tribe, Petitioner and Upstream terminated this agreement. App.9.

Respondent filed suit against Petitioner and Upstream in the United States District Court for the Northern District of California alleging a claim

under California law for tortious interference with contract. App.8 The Tribe commenced a separate declaratory action in the same court seeking a declaratory judgment that the Tribe's agreements with Respondent were invalid. *Id.* The cases were then consolidated. *Id.*

On October 19, 2005, the district court granted summary judgment in the Tribe's favor on the claim for declaratory relief. App.8-9. The district court held that Section 81 applied to contracts involving Indian lands not yet acquired and not yet transferred into trust; and, because the Secretary of the Interior had not approved the Tribe's contract with Respondent as required under Section 81, the Lease and CMA were invalid. *Id.* The district court also granted Petitioner and Upstream's motion for summary judgment, dismissing Respondent's tortious interference claim because no valid contract existed between Respondent and the Tribe, which is a necessary element for the tort alleged. *Id.* Respondent appealed to the Ninth Circuit. *Id.* While the appeal was pending, Respondent entered into a settlement with Upstream and Upstream was dismissed from the action. *Id.*

On June 26, 2008, in a 2-1 decision, the Ninth Circuit vacated the declaratory judgment for the Tribe holding that the Tribe's declaratory action did not present a justiciable case or controversy. App.10-12. In addition, the panel majority reversed the grant of summary judgment for Petitioner. App.33. The majority concluded that the Lease and CMA did not require Section 81 Secretarial approval because such approval is only required for contracts that encumber existing Indian lands. App.32-33.

Since the lands on which the gaming development was to be located had not been acquired as of the date of the CMA and Lease's execution, the majority concluded that the requirement of Section 81 Secretarial approval was not triggered by these agreements. App.33.

In reaching this result, the panel majority refused to apply the Dictionary Act's rule that words used in the present tense include the future tense as well as the present. 1 U.S.C. § 1. Specifically, the panel majority refused to apply this rule to construe the definition of "Indian lands" found in Section 81(a) -- "lands the title to which is held by the United States in trust" (emphasis added) -- to include both land that "is held by the United States in trust for an Indian tribe" and land that "will be held in trust by the United States in trust for an Indian tribe". App.15-24. The panel majority refused to apply the Dictionary Act because it concluded that the definition of "Indian lands" was not ambiguous. App.16-17. In addition, the majority concluded that the definition's context indicated that it only applied to existing Indian lands and not Indian lands to be acquired after the contract's execution. App.17-22.

The dissent disagreed with both of these conclusions, opining that the Dictionary Act's rule that words used in the present tense include the future as well as the present presumptively applies to all Congressional Acts regardless of whether or not the statutory language is ambiguous. App.37-38. Further, the dissent found nothing in the context of the definition of "Indian lands" to defeat this

presumption that words used in the present tense include the future tense. App.38-40.

### 3. The Second Circuit Opinion Conflicts with That of the Ninth Circuit.

In *Catskill Development, LLC v. Park Place Entertainment Corp.*, --- F.3d ----, 2008 WL 4630309 (2nd Cir., Oct. 21, 2008), a unanimous Second Circuit panel expressly disagreed with the Ninth Circuit's application of the Dictionary Act. App.82-83. The Second Circuit addressed a similar claim brought by an unsuccessful Indian gaming developer who sued a competitor for alleged tortious interference with contracts between the developer and the Mohawk Indian Tribe. App.65-66. The competitor argued, and the district court agreed, that the developer's contracts were invalid because they were management contracts that did not receive the National Indian Gaming Commission's ("NIGC") approval as required by 25 U.S.C. § 2711. App.79-80.

On appeal, the developer argued that NIGC approval of the contracts at issue was not required because at the time the contracts were executed, the Mohawk Indian Tribe did not possess the trust lands on which the gaming development was to be constructed. App.80-81. The developer further argued that NIGC approval is only required for management contracts that relate to existing Indian lands -- not Indian lands intended to be acquired after the contracts are executed. *Id.* The Second Circuit unanimously rejected this contention. First, it stated that the NIGC's authority to review management agreements arguably did not hinge on

whether the contracts relate to Indian lands. App.81-82. But the Court alternatively held that the definition of "Indian lands" in IGRA includes Indian lands to be acquired post-contract execution. App.82-83. As the court explained, "[t]he Dictionary Act, 1 U.S.C. § 1, instructs that '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise ... words used in the present tense include the future as well as the present.'" App.82. Accordingly, "when construing the definition of 'Indian lands' in 25 U.S.C. § 2703(4), the Dictionary Act instructs us to read the words 'which is held in trust' to also include land that will be held in trust." *Id.* As support for this conclusion, the Second Circuit cited to the Ninth Circuit's dissent. *Id.* The court observed that there was "no dispute here that the purpose of all of the contracts at issue was to build and operate a casino on what was intended to become Indian land." App.83.

While observing that Section 81 and Section 2711 differ in that the former involves review of contracts that encumber Indian lands while the latter involves review of management contracts, the Second Circuit nonetheless stated, "[t]o the extent these differences are not material to the Ninth Circuit's majority opinion, we nevertheless agree with Judge Smith's dissenting view that transactions involving land that 'will be' held in trust trigger the agency's review authority, especially where specific land to be taken into trust is identified in the operative agreements." App.82-83. The narrow "existing trust lands only" construction advocated by the developer and adopted by the Ninth Circuit would, in the Second Circuit's view, "thwart Congress's intent to have the NIGC

oversee contracts for the purpose of promoting the best interests of Indian tribes." App.83.

## REASONS FOR GRANTING THE WRIT

### 1. The Decisions of the Ninth and Second Circuits Are Irreconcilable, and Create a Circuit Split on Important Questions of Statutory Interpretation.

The decisions of the Ninth and Second Circuits are directly in conflict with one another and cannot be reconciled. Each case involved contracts that implicated Indian trust lands. Each case involved a requirement for federal agency approval for such contracts -- Section 81 Secretarial approval in this case and Section 2711 NIGC approval in *Catskill Development*. Each involved a nearly identical definition of "Indian lands." But the two Circuits parted company on the role of the Dictionary Act in construing the definition of Indian lands.

This Court should reconcile these conflicting decisions. Not only do the two Circuits differ on the appropriate application of the Dictionary Act to the definition of "Indian lands," the Ninth and Second Circuit also disagree about the fundamental nature of the federal government's relationship with Indian tribes. According to the Ninth Circuit, "Congress now considers self-determination -- not paternalism -- to be in the Indians' best interest." App.27. By contrast, the Second Circuit stated that the "narrow interpretation" of "Indian lands" adopted by the Ninth Circuit "would thwart Congress's intent" to have a government agency "oversee contracts for the

purpose of promoting the best interest of Indian tribes." App.83.

These conflicting decisions have potentially broad and sweeping consequence. The Ninth Circuit panel majority's opinion essentially reads out of existence the Dictionary Act's present-tense-equals-the-future-tense rule. By operation of the majority's decision, this rule applies, if at all, only if the statutory text at issue is ambiguous -- a gloss this Court has never attached to the Dictionary Act. Rather, this Court has described the Dictionary Act's rules as "mandatory", *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 689 n.5 (1978), as "presumptive rules", *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 782 (2000), and as "default rules". *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 490 (2005). Statutory ambiguity, or the lack thereof, has not factored into this Court's Dictionary Act jurisprudence.

A practical consequence of this Circuit split is the contractual uncertainty it creates: *i.e.*, the same contracts encumbering after-acquired Indian trust lands that the Ninth Circuit sanctioned in this case would not, under *Catskill Development*, be valid and enforceable in any of the states comprising the Second Circuit. Without authoritative resolution by the Supreme Court, Indian tribes, and parties with whom they wish to contract, will neither be able to determine what existing contracts are valid without agency approval, nor enter into potential contracts with confidence that the contracts will be enforced by the courts.

Moreover, the Circuit split creates uncertainty for the pertinent federal agencies as well. In the Ninth Circuit, a contract that attempts to encumber for seven years or more Indian lands not yet acquired would not require Section 81 review. Conversely, that same contract **would** require Section 81 review in the Second Circuit. Because of the Circuit split, the Secretary of the Interior is receiving contradictory guidance from the lower federal courts on an issue where clear guidance is necessary.

Finally, and perhaps most ominously, by operation of the panel majority's decision, Section 81 Secretarial approval -- intended "to protect the Indians from improvident and unconscionable contracts...", *In re Sanborn*, 148 U.S. at 227 -- does not apply in the Ninth Circuit to contracts that purport to encumber future-acquired Indian lands. Further, the majority's reasoning logically extends to IGRA's virtually identical definition of "Indian lands" that the Second Circuit construed in *Catskill Development*. In this respect, Section 2711 expressly incorporates the review mechanism of Section 81 and transfers the approval power to the NIGC. *See* 25 U.S.C. § 2711(h) ("The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission."). Thus, since the panel majority's interpretation rejects Section 81 review of contracts that relate to future-acquired lands, the majority's interpretation also necessarily defeats NIGC review of management contracts that relate to future-acquired lands. This is an incongruous interpretation of a statute enacted with the specific purposes of

"promot[ing] tribal economic development, self-sufficiency, and strong tribal governments," while simultaneously "shield[ing tribes] from organized crime and other corrupting influences [and] ensur[ing] that ... Indian tribe[s] [are] the primary beneficiar[ies] of ... gaming operation[s]." 25 U.S.C. § 2702.

In sum, the Ninth Circuit panel majority's decision extends an open invitation to unscrupulous developers to evade federal agency review and take advantage of Indian tribes by consciously entering into contracts that encumber or impinge Indian lands that have not been acquired as of the date of contract execution, but which of necessity need to be acquired to fulfill the contractual purposes. But within the Second Circuit, the protections afforded Indian tribes by both Section 81 Secretarial review and Section 2711 NIGC review continue to extend to agreements affecting both existing Indian lands and those Indian lands that are yet to be acquired upon the parties' execution of the agreements.

An irreconcilable circuit split that involves such important issues of statutory interpretation, cries out for this Court's certiorari review. Moreover, the Ninth Circuit opinion's "significant impact on the relationship between Indian tribes and the Government" is a sufficient reason even apart from the circuit split to grant the petition for certiorari. *See Dept. of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001). By refusing to apply the Dictionary Act to 25 U.S.C. § 81, the Ninth Circuit contravened Congress's intent that the Executive Branch oversee contracts implicating Indian lands and rejected this Court's and

Congress's instruction regarding the application of the Dictionary Act.

For these reasons alone, the certiorari petition should be granted.

**2. The Ninth Circuit's Decision Is Incorrect.**

This Court has never considered the Dictionary Act's rule that statutory usages in the present tense also include the future tense. But the Court has, on numerous occasions, considered other Dictionary Act provisions, and has specifically rejected a construction of the Dictionary Act's rules as being merely "allowable" but not "mandatory". *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 689 n.5 (1978). Rather, this Court has characterized the Dictionary Act's provisions as "presumptions", *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 782 (2000), and as sources of "default" definitions "unless the context indicates otherwise." *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 490 (2005). The Court has frequently relied upon the Dictionary Act's rules of construction when interpreting federal statutes.[1]

The Ninth Circuit panel majority's analysis of the Dictionary Act's present-tense-equals-the-future-tense rule is plainly erroneous. As noted, the panel

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[1] *See, e.g., Stewart v. Dutra Construction Co.*, 543 U.S. 481, 490 (2005); *Cook County, Illinois v. U.S. ex rel. Chandler*, 538 U.S. 119, 127 (2003); *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 782 (2000); *Ngiraingas v. Sanchez*, 495 U.S. 182, 190-91 (1990); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 774, 799 (1984); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 689 & n.53 (1978).

majority concluded that the Dictionary Act only applies (if it applies at all) when a statute is ambiguous, essentially applying a judicially created canon approach to the Dictionary Act. App.16-17. The application of a canon of statutory construction, however, differs markedly from the application of a statutory rule. Judicially created canons of statutory construction are not mandatory rules. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Instead, they are guides that are not necessarily conclusive. *Id.* The Dictionary Act's rules, by contrast, are mandatory default rules that are to govern statutory construction unless the context indicates otherwise. *Stewart*, 543 U.S. at 490; *Monell*, 436 U.S. at 689 n.5. By its express terms, therefore, the Dictionary Act presumptively applies "[i]n determining the meaning of **any** Act of Congress, unless the context indicates otherwise ...." 1 U.S.C. § 1 (emphasis added). The Ninth Circuit panel majority's unsupported creation; namely that the Dictionary Act only applies to ambiguous statutes, is directly contrary to the Dictionary Act's express terms, and is, therefore, erroneous.

The majority also argued that Congress could have drafted Section 81 to include the future tense if it so intended. But Congress's purpose in enacting the Dictionary Act was to eliminate this necessity. In 1948, Congress inserted into the Dictionary Act the language "words used in the present tense include the future as well as the present." Act of June 25, 1948, 62 Stat. 859. Thereafter, effective 2000, Congress amended Section 81 to include the present definition of "Indian lands." The dissent cogently observed that "[b]ecause we presume that

Congress is knowledgeable about existing law when it passes new legislation, we must presume that Congress was aware of the Dictionary Act when it enacted § 81." App.40. Thus, there is no reason for Congress to draft a statute with language in both present and future tense; indeed, such drafting "would be illogical given that the Dictionary Act already addresses the future tense in 'any Act of Congress.'" *Id.*

The majority also attempted to rely on the Dictionary Act's proviso "unless the context indicates otherwise" to conclude that Section 81's context precludes the use of the future tense. For Dictionary Act purposes, context is "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Rowland v. California Men's Colony*, 506 U.S. 194, 199 (1993). As the dissent observed, "the words of § 81 do not provide a different context. There is no finding in the majority opinion or arguments in the briefs of the parties suggesting that the words of the statute surrounding 'which is held' provide a different context." App.38.

Instead, and without citing to any supporting Supreme Court precedent, the majority suggested that other statutes -- specifically 25 U.S.C. §§ 465, 2710, and 2719 -- provide the "context" to reject reading Section 81 to include the future tense, as mandated by the Dictionary Act. App.19-22. In so doing the majority went much farther afield then the concept of "contextual indicators" allows. While context can include "other related acts", *Rowland*, 506 U.S. at 199, this should not be a license to roam through the Title wherein the statute at issue lies

for purported contextual indicators. Notably, in *Rowland*, this Court looked for contextual indicators to interpret the word "person" as used in 28 U.S.C. §§ 1915(a) and 1915(d) solely by reference to other language found or absent in Section 1915. *Id.* at 201-04. No decision of this Court has endorsed the free-ranging search for contextual indicators that the panel majority employed.

Moreover, the statutes upon which the panel majority relied provide no contextual indicators that the term "Indian lands" only refers to then-existing Indian lands. As the dissent noted, these other statutes, "provide additional protections to the Indian tribes and their lands, but provide no support for the proposition that the Dictionary Act should not apply to § 81." App.38. The dissent further observed that "[n]one of the language in sections 465, 2710, or 2719 even addresses contracts encumbering Indian lands, much less provides a context suggesting that § 81 can include only the present tense." App.39.

The panel majority also incorrectly implied that the statutory language in the Dictionary Act should be rejected as archaic. But as noted above, the present-tense-equals-the-future-tense rule was not added until 1948, which hardly renders this provision "hoary." "Acts of Congress ... are not presumed invalid until declared so by the Supreme Court. Simply because the Supreme Court has not yet addressed this issue does not affect the application of the Dictionary Act to the facts of this case." App.40.

Finally, the majority contended that its interpretation of Section 81 as applying only to existing trust lands comports with a "more modern attitude toward Indian tribes." App.26. In so doing, the majority ignores Section 81's text and recent legislative history. As noted in the Statement *supra* at 7, when Congress revised Section 81 effective in 2000, it included new language specifically setting forth a requirement that contracts encumbering Indian lands for a period of seven years or more have Secretarial approval. This fact belies the majority's conclusion that its reading of Section 81 is supported by a "more modern attitude toward Indian tribes". App.26. Congress specifically retained the Secretarial approval requirement for "a limited number of transactions that could place tribal lands beyond the tribe's ability to control the lands in its role as proprietor." S. Rep. No. 106-501 at 9. Hence, Congress expressly retained Section 81's Secretarial approval for contracts that would encumber Indian trust lands for seven years or more -- a measure of the "paternalism" so decried by the panel majority -- and the Lease and CMA are precisely of this type of contract.

The dissent noted the mischief inherent in the majority's construction of Section 81. As the dissent observed, "[l]imiting § 81's definition of Indian lands to only the present tense -- land which 'is held in trust' -- undermines the protection § 81 is intended to provide to the Indian tribes." App.36. Parties can use the majority's reading of Section 81 to "easily circumvent the statute." *Id.* The dissent noted further that under the majority's construction of Section 81:

> The parties, fully intending that their contract will encumber Indian lands for more than seven years, can simply execute their contract before the lands are conveyed into trust. Because such a contract would not pertain to land presently held in trust by the United States for an Indian tribe, the contract would not require the approval of the Secretary of the Interior.

App.36.

This would be true, the dissent continued, with contracts such as the Lease and CMA, where "the parties always intended that the land would be held in trust by the United States for the Indian tribe and even if the contract contained an explicit provision requiring that the land be held in trust by the United States for the Indian tribe." *Id.* The Second Circuit voiced similar concerns when rejecting the present tense only construction of Indian lands in *Catskill Development*:

> The Catskill Group's narrow interpretation -- which would give the NIGC review authority over only contracts relating to already existing Indian land -- would thwart Congress's intent to have the NIGC oversee contracts for the purpose of promoting the best interests of Indian tribes. *See* 25 U.S.C. §§ 2701, 2702.

App.82-83.

The panel majority's construction of Section 81 will enable, and even embolden, unscrupulous developers to take advantage of the very Indian tribes Section 81 was enacted to protect, by simply manipulating the timing of their predatory agreements to skirt around the federal review which inevitably would invalidate those agreements.

For these additional reasons, the certiorari petition should be granted.

## CONCLUSION

The decisions of the Ninth and Second Circuits are irreconcilably in conflict with one another. Their competing constructions of "Indian lands" cannot be harmonized. Nor can their contrasting approaches to applying the presumptive rules of the Dictionary Act be reconciled in a principled manner. Lastly, the Ninth Circuit panel majority's constructions of 1 U.S.C. § 1 and 25 U.S.C. § 81 are simply incorrect and contrary to the broad and protective purposes behind these enactments. Petitioner respectfully submits that the petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

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NOVEMBER 12, 2008

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

GUIDIVILLE BAND OF POMO INDIANS,
*Plaintiff-Appellee,*

No. 05-17066
CV-05-01605-SC

NGV GAMING, LTD, a Florida partnership,
Defendant-Appellant.

No. 05-17067
D.C. No. CV-04-03955-SC

NGV GAMING, LTD,
a Florida partnership,
*Plaintiff-Appellant,*

**OPINION**

HARRAH'S OPERATING COMPANY, INC.,
a Delaware corporation,
*Defendant-Appellee.*

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted
October 16, 2007—San Francisco, California

Filed June 26, 2008

Before: Stephen S. Trott and N. Randy Smith,
Circuit Judges, and Milton I. Shadur,*
Senior District Judge.

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*The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

Opinion by Judge Shadur;
Dissent by Judge N.R. Smith

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## OPINION

SHADUR, Senior District Judge:

This appeal presents the single, seemingly straightforward question whether the word "is" really means "is," at least as that word is employed in 25 U.S.C. § 81.[1] At the core of the present dispute, that statute requires the Secretary of the Department of the Interior ("Secretary") to approve any "contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years" before such a contract can be considered valid. Section 81(a) defines the

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[1] That and all other provisions of Title 25 will hereafter be cited simply "Section —," omitting the prefatory "25 U.S.C."

term "Indian lands" in part as "lands the title to which *is* held by the United States in trust for an Indian tribe" (emphasis added).

Appellant NGV Gaming Ltd. ("NGV") asks us to read Section 81 literally— as pertaining solely to contracts that implicate lands already held in trust by the federal government. Appellees Harrah's Operating Company ("Harrah's") and Guidiville Band of Pomo Indians ("the Tribe"[2]), on the other hand, urge a nonliteral reading of the statute—one that would treat Section 81 as also covering contracts in which the parties reach agreement, not with respect to already-held lands, but to acquire lands in the future that might eventually be held in trust. Under the latter interpretation the contract at issue in this appeal would be invalid, lacking as it does the Secretary's approval, and the district court's decision to dismiss NGV's suit against Harrah's for tortious interference with that contract would have to be affirmed. But under the first—and literal—reading, the district court's decision would be in error, and the state law action could proceed.

Motivated largely by the plain meaning of Section 81 —but after also taking into account related statutes, relevant legislative history and the language of the contract itself—we conclude that the word "is" means just that (in the most basic, present-tense sense of the word) and that Section 81 therefore applies only to contracts that affect lands already held in trust by the United States. We therefore reverse the district court and remand for further

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[2] Because that Appellee has consistently referred to itself as "the Tribe" in its briefs, we too adopt the same shorthand reference.

proceedings.

## I. Factual Background

### A. Terms of the Contract

On July 3, 2002 the Tribe contracted with FEGV Corporation ("FEGV") for the latter to develop and construct a gaming facility on a to-be-acquired parcel of land in Northern California. In December 2003 FEGV assigned to NGV its rights and duties under that contract, which comprised two separate documents: (1) a Development Agreement and Personal Property Lease ("the Lease"), and (2) a Cash Management Agreement. Here is the purpose of the transaction as described at the outset of the Lease:

> The Tribe requires assistance with (i) financing the day-to-day operations of the Tribal government, (ii) acquiring real property and petitioning the United States to accept title to such property in trust for the benefit of the Tribe . . . , and (iii) the development, design, financing, construction and initial equipping of the Facility.

"Facility," the Lease explains, includes "buildings and improvements" that would be constructed on to-be-acquired real property and that would then be used to conduct Class II or Class III gaming[3] for the public. Both parties intended to transfer the to-be-acquired real property into trust, a

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[3] Class II gaming includes bingo and certain card games, but excludes any "banked card games, electronic games of chance, and slot machines" (Sections 2703(7)(A) and (B)). Class III gaming involves all other forms of high-stakes games (Section 2703(8)).

process set forth under Section 465 that allows the United States to accept and hold property for the benefit of an Indian tribe.[4] But to be clear: No such land existed at the time the contract was entered into—nothing had been identified or acquired or, least of all, had been placed in trust.

NGV's role in that forward-looking endeavor was to use its "experience, expertise and resources. . . to assist the Tribe" in accomplishing its objectives. In exchange NGV would be compensated through a combination of fixed payments and a percentage of gross and net revenues earned by the newly constructed gaming facility. In addition NGV would enjoy other rights related to the land. Most notably, under the Lease the Tribe could not without NGV's consent:

> Sell, dispose of, lease, assign, sublet, transfer, mortgage or encumber (whether voluntarily or by operation of law) all or any part of its right, title, or interest in or to the Trust Lands, the Facility, or the Equipment.

Finally the Lease set forth several commitments, one of which is critically important to

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[4] Section 465 authorizes the Secretary "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians." In addition the statute specifies (emphasis added):

> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States *in trust for the Indian tribe* or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

this appeal. It specified that the Tribe would "[o]btain all necessary and appropriate federal and tribal permits and approvals necessary with respect to the enforceability of the [Lease and Cash Management Agreement] or the operation of the Facility." Among such potential federal approvals was the approval contemplated by Section 81. Another potentially relevant federal statute was Section 2710(b)(2)(A), which calls for the Chairman of the National Indian Gaming Commission ("Gaming Commission") to approve "any tribal ordinance or resolution" involving Class II gaming on Indian lands.

### B. Rescission of Tribe's Contract with NGV

Beginning in January 2004 Harrah's and Upstream Molate, LLC ("Upstream") partnered and entered into negotiations to purchase 354 acres of land from the City of Richmond, California. Harrah's and Upstream intended to place that land in trust on behalf of the Tribe and to use the land to build a gaming facility that the Tribe would operate. According to NGV, Harrah's and Upstream began those negotiations despite knowing of the Tribe's pre-existing obligations to NGV.

On August 2, 2004 the Tribe—acting through its chairperson, Merlene Sanchez—sent a letter to NGV seeking to rescind their contract. Sanchez explained that the Tribe had submitted their contract to the Bureau of Indian Affairs ("Bureau") and the Gaming Commission for both agencies' approval under Sections 81 and 2710. Because the Gaming Commission had already informed the Tribe that its contract with NGV was illegal, Sanchez concluded that the Tribe had "no choice but to rescind the agreement."

Indeed, in a letter dated July 21, 2004 the Gaming Commission explained that the Tribe's contract with NGV violated Section 2710(b)(2)(A). It stated that "the Agreements evidence Developer's proprietary interest in the Tribe's gaming activity" and that such a proprietary interest contravened the Indian Gaming Regulatory Act ("IGRA").

Similar news came from the Bureau on April 13, 2005. After reviewing the Lease and Cash Management Agreement, that agency "concluded, as a matter of law, that the agreements must be approved by the Secretary under Section 81 in order for them to be valid and enforceable." Absent such approval, the Bureau explained, the contract was "unenforceable as a matter of law." Its conclusion, it noted, stemmed from information provided to it by attorneys for the Tribe "showing that the United States had accepted at least three parcels in Mendocino County, California, into trust for the benefit of the Tribe in 1999." Those 44 acres had been accepted into trust in 1999 with the intention that they would be used by the Tribe for residential development, not a gaming facility. Based on the existence of the Mendocino County property the Bureau "determined that the Tribe has an interest in 'Indian land' as defined in §81(a)," and that interest was encumbered by its contractual provision with NGV that "affirmatively require[s] the Tribe to refrain from selling or disposing of any part of an interest the Tribe has in Indian land . . . so long as the agreements remain in effect."

In August 2004—before having received the Bureau's letter but after having received the Gaming Commission's decision—the Tribe officially entered

into an agreement with Harrah's and Upstream to develop and manage the Tribe's proposed gaming facility. That agreement contained an indemnification clause requiring the Tribe to defend Harrah's against any future claims made by NGV.

### C. Procedural History

NGV eventually filed suit against both Upstream and Harrah's in the federal district court, alleging that those two defendants had tortiously interfered with its existing contract with the Tribe. Later the Tribe filed its own lawsuit seeking declaratory and injunctive relief against NGV, asking to have the Lease and Cash Management Agreement declared invalid under applicable federal statutes. Both actions—NGV's against Upstream and Harrah's and the Tribe's against NGV —were later consolidated.

On July 28, 2005 the Tribe, Harrah's and Upstream all moved for summary judgment. NGV responded by contesting the district court's subject matter jurisdiction. It claimed that there was no case or controversy between NGV and the Tribe, for NGV had assured the Tribe that it would not file an action against it. For its part the Tribe contended that there was subject matter jurisdiction based upon (1) the Tribe's obligation to indemnify Harrah's against claims made by NGV and (2) the Tribe's continuing interest in developing a gaming facility without fear of litigation.

On October 19, 2005 the district court granted the Tribe's motion for declaratory relief. In particular the court held that (1) it had subject matter jurisdiction over the Tribe's declaratory relief action;

(2) Section 81 applied to contracts involving lands not yet acquired and not yet transferred into trust; and (3) because the Secretary of the Interior had not approved the Tribe's contract with NGV as required under Section 81, the contracts were invalid. As a result the district court granted the Tribe's motion. In so doing it also granted Harrah's and Upstream's motion for summary judgment, dismissing NGV's tortious interference claim as a matter of law because no valid contract existed between NGV and the Tribe.

NGV timely filed this appeal. While it was pending this court granted NGV's motion for the voluntary dismissal of Upstream from the matter because those two parties had settled. In addition, while this appeal was pending the Tribe and Harrah's terminated their contract and entered into a settlement agreement that provided in part for the Tribe's continued indemnification of Harrah's against claims made by NGV—but the Tribe acknowledges that its original contract with Harrah's (the one that spawned the termination and its continued indemnification undertaking) lacked the approval necessary under Section 2710.

## II. Standards of Review

We review both the existence of subject matter jurisdiction and a grant of summary judgment de novo *(Galt G/S v. JSS Scandinavia,* 142 F.3d 1150, 1153-54 (9th Cir. 1998)). In reviewing the latter decision, we determine whether there are any genuine issues of material fact for trial, viewing the evidence in the light most favorable to the nonmovant *(Gammoh v. City of La Habra,* 395 F.3d 1114, 1122 (9th Cir. 2005)). We also review de novo the interpretation and construction of statutes *(Soltani v.*

*W. & S. Life Ins. Co.*, 258 F.3d 1038, 1041 (9th Cir. 2001)), as well as the principles of contract interpretation as applied to the facts before us *(L.K. Comstock & Co. v. United Eng'rs & Constructors Inc.*, 880 F.2d 219, 221 (9th Cir. 1989)).

### III. The Tribe's Claim Against NGV

We begin with the Tribe's effort to obtain a declaratory judgment, seeking a proclamation that its agreement with NGV was invalid because it had not been approved by the Secretary pursuant to Section 81 or, in the alternative, because it violated Section 2710. We have no occasion to decide the merits of those questions—at least not at this stage of this opinion[5] —because we conclude that the Tribe's efforts do not belong in the federal courts at all.

**[1]** It is undisputed that the Tribe's claimed adversary NGV has released it from any liability whatever, looking instead solely to a claim against Harrah's. And the Tribe has itself recognized that its management contract with Harrah's (which would have imposed on it an indemnification obligation covering NGV's claims against Harrah's) was void under Section 2705(a)(4) due to the Tribe's failure to have obtained approval of that contract by the Chairman of the Gaming Commission.[6] That being so, the Tribe

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[5] Because the Tribe and Harrah's advance the same substantive arguments as to why the agreement between the Tribe and NGV is invalid, and because there is no doubt that this court has subject matter jurisdiction over NGV's claim against Harrah's, we eventually reach the merits of the case (see Section IV)—we just do not do so in the context of the Tribe's claim.

[6] Because the Tribe's agreement with Harrah's was subject to a different statutory provision from the section applicable to the Tribe's agreement with NGV, such Section 2705(a)(4) invalidity

cannot bootstrap itself into an Article III case or controversy vis-a-vis NGV by undertaking a new indemnification obligation as part of an agreement to terminate its already void contract with Harrah's—an indemnification promise that is wholly lacking in consideration and is hence itself invalid.[7]

In short, the Tribe—which does not itself face any potential liability to NGV—must try to fall back on its claimed sense of uncertainty about any future essays into the gambling industry. But those uncertainties exist only in outer space— they surely cannot be trotted out against NGV, with which the Tribe no longer has any contractual relationship or any ongoing exposure to liability. Instead such uncertainties raise wholly speculative concerns that call for a type of purely advisory opinion that federal courts are prohibited by the Constitution from giving to putative litigants (see, e.g., *City of Los Angeles v. Lyons,* 461 U.S. 95, 106-07, 110-11 (1983), holding that because Lyons could not show that he "faced a real and immediate threat of again being illegally choked," his claim was "speculative" in nature and

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did not extend to the latter.

[7] It is most disturbing that the Tribe and Harrah's parted company by terminating their agreement back in *March* of 2007 but concealed that fact until oral argument of the case was almost upon us months later (remember that the terminated contract was the peg on which the Tribe sought to hang its jurisdictional hat). Now the Tribe seeks to supplement the record before us with material previously withheld both from NGV and from this Court in an effort to salvage its claim. But as indicated in the text, any claimed case or controversy as between the Tribe and NGV ceased to exist once *their* contract was terminated and NGV released the Tribe from any potential liability, given the invalidity of the original Tribe-Harrah's agreement that contained the claimed indemnification provision.

therefore could not meet Article III's "case or controversy" requirement).

As already stated, that alone should operate to knock the Tribe out of the box in terms of standing to pursue its own litigation. This case scenario poses a dramatic contrast to litigation such as a patent case seeking a declaratory judgment (see, e.g., *Société de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 942-44 (9th Cir. 1981)), where there are two parties involved in the dispute with actual interests "of sufficient immediacy and reality" *(Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)), even though no infringement action has been brought.

**[2]** If, as and when the Tribe chooses to engage in a future proposed entry into gambling activity with some other party and may then seek a declaration of its rights under a contract with *that* party, there may perhaps be federal subject matter jurisdiction to address that subject (a question that need not be answered here because it is purely hypothetical). But here, with the contractual relationship that once bound NGV and the Tribe already having been terminated, there is no one on the other side of the "v." sign from the Tribe—and that is fatal in jurisdictional terms. We thus vacate the district court's decision to grant the Tribe the declaratory relief it sought.

## IV. NGV's Claim Against Harrah's

We turn now to NGV's claim that Harrah's tortiously interfered with the contract that once bound NGV and the Tribe. Under California law "[t]he elements of a cause of action for intentional

interference with contract are: (1) a valid contract between plaintiff and a third party; (2) defendants' knowledge of the contract; (3) defendants' intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage" *(Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist.*, 132 Cal. Reptr.2d 57, 73 (Cal. Ct. App. 2003)). At issue in this appeal is the first element of the tort: NGV contends that its contract with the Tribe was valid because it did not require approval under Section 81, while Harrah's argues that the contract was invalid precisely because it lacked such approval. In the alternative, Harrah's argues that the contract violated Section 2710, which requires that an "Indian tribe have the sole proprietary interest and responsibility for any gaming activity."

We address each of those arguments in turn, tackling the Section 81 inquiry first. That inquiry calls for a consideration of a number of factors, including the plain language of the statute, the role (if any) of 1 U.S.C. §1, relevant legislative history and, of course, the actual language of the agreement that once bound NGV and the Tribe.

### A. Plain Language of Section 81

Our analysis begins with the plain language of Section 81, not only because that is the natural starting point dictated by all accepted canons of statutory construction but also because the statute's unequivocal present-tense use of the word "is" does a tremendous amount of the legwork in settling one of the main questions raised on this appeal. In full Section 81(a) defines the term "Indian lands" as

(emphases added):

> lands the title to which *is* held by the United States in trust for an Indian tribe or lands the title to which *is* held by an Indian tribe subject to a restriction by the United States against alienation.

Section 81(b) then prescribes:

> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

**[3]** In this instance the Tribe-NGV contract was not within the purview of Section 81 because it plainly did not implicate "Indian lands" in statutory terms. Section 81(a)'s use of the present tense in defining "Indian lands" unambiguously prescribes that title to the real estate must *already* be held by the United States in trust for a tribe. Had Congress intended that Section 81 also extend to lands that might later be held in trust, it would have been the simplest of matters to word the statute differently. That it did not do so is not a linguistic decision to be treated lightly (see *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003), explaining that "Congress's explicit decision to use one word over another in drafting a statute is material" and adding that "[i]t is a decision that is imbued with legal significance and should not be presumed to be random or devoid of meaning"; *Biehl v. CIR*, 351 F.3d 982, 987 (9th Cir. 2003), writing that courts "will not stretch the statutory language to cover a situation not contemplated

by Congress").

[4] Here the parties entered into their contract expressly contemplating— specifically intending— that land would *later* be identified and acquired and then *still later* transferred to the United States to be held in trust for the Tribe. But no such lands existed when the Tribe and NGV entered into their contract. Hence the portion of Section 81 that limits the duration of encumbrances on "Indian lands" is simply inapplicable to this case.

### B. Role of the Dictionary Act in Interpreting Section 81

[5] Contrary to the contention raised by the dissent, nothing in our reading of Section 81 contravenes 1 U.S.C. §1.[8] More commonly referred to as the Dictionary Act, that statute reads in relevant part:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> . . . .
>
> words used in the present tense include the future as well as the present.

Focusing upon the phrase "words used in the present tense include the future as well as the present," the

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[8] That statute was not adverted to by either party in the original briefing on the appeal (or for that matter before the district court). We invited input from the litigants on that score following oral argument, and each party has had ample opportunity to address through their supplemental briefing the question of what if any effect the Dictionary Act has on the interpretation of Section 81.

dissent asserts that the word "is" as used in Section 81(a) encompasses *both* lands that are currently held in trust by the United States for an Indian tribe *and* lands that might eventually be held in similar fashion. But in so doing, the dissent fails to grapple adequately with (1) the Supreme Court's repeated instructions regarding proper statutory construction and (2) the directive in the Dictionary Act itself that compels us to consider first the "context" of the statute.

**[6]** First, the Supreme Court has not once invoked the Dictionary Act in an effort to convert an unambiguous verb tense into claimed ambiguity, let alone then going on to employ that manufactured ambiguity as a stepping stone to altering the plain sense of a statute.[9] Here is the succinct directive in *United States v. Wilson*, 503 U.S. 329, 333 (1992) and

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[9] On those limited occasions that the Supreme Court *has* turned to the Dictionary Act, it has done so to illustrate better the meaning of the word "person," which the statute defines as "includ[ing] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" (see, e.g., *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 713 n.1 (2003) (Stevens, J., concurring in judgment); *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 196 (1993); *Ngiraingas v. Sanchez*, 495 U.S. 182, 190-91 (1990); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 69 (1989)). We ourselves have relied on the Dictionary Act for the same purpose (see *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000)). And on one other occasion we have relied on the Dictionary Act simply to corroborate an independent conclusion—derived solely from "the plain language of the statute"—that a criminal statute written in the present tense cannot be used to penalize past behavior (*United States v. Jackson*, 480 F.3d 1014, 1019 (9th Cir. 2007)). Because none of those cases approaches the situation presented here, none affects this decision.

the cases that it cites:

> Congress' use of a verb tense is significant in construing statutes. See, *e.g., Otte v. United States,* 419 U.S. 43, 49-50 (1974); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,* 484 U.S. 49, 63-64, n.4 (1987).

Similarly, *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450 (2002) made clear that in "all statutory construction cases, we begin with the language of the statute." Inquiries into the meaning of a statute come to an end "if the statutory language is unambiguous and the statutory scheme is coherent and consistent" *(id.,* quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997)(internal quotation marks omitted)). Given the specific and unambiguous manner in which Section 81(a) defines the term "Indian lands," it is not apparent why the Dictionary Act must even be consulted.

**[7]** Second, even on its own terms the Dictionary Act supports the analysis here: It looks first to "context," and only if the "context" leaves the meaning open to interpretation does the default provision come into play. As defined by *Rowland,* 506 U.S. at 199-200 (alterations in original, emphasis added):

> "Context" here means the text of the Act of Congress surrounding the word at issue, *or the texts of other related congressional Acts,* and this is simply an instance of the word's ordinary meaning: "[t]he part or parts of a discourse preceding or following a 'text' or passage or a word, or so intimately associ-

> ated with it as to throw light upon its meaning." Webster's New International Dictionary 576 (2d ed. 1942). While "context" can carry a secondary meaning of "[a]ssociated surroundings, whether material or mental," *ibid.*, we doubt that the broader sense applies here.

And *Rowland, id.* at 199 went on to explain that the word "indicates" broadens the scope of the inquiry that a court must make *(id.* at 200):

> If "context" thus has a narrow compass, the "indication" contemplated by 1 U.S.C. §1 has a broader one. The Dictionary Act's very reference to contextual "indication" bespeaks something more than an express contrary definition, and courts would hardly need direction where Congress had thought to include an express, specialized definition for the purpose of a particular Act; ordinary rules of statutory construction would prefer the specific definition over the Dictionary Act's general one. Where a court needs help is in the awkward case where Congress provides no particular definition, but the definition in 1 U.S.C. §1 seems not to fit.[10] There it is that the qualification "unless the context indicates otherwise" has a real job to do, in excusing the court from forcing a

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[10] [Footnote by this Court] Of course that observation alone further strengthens our original position that the Dictionary Act need not even be considered, given that Congress *did* provide a specific definition of the term "Indian lands" in Section 81(a). We nonetheless continue down this analytical path so as to respond to the dissent's argument on its own terms.

square peg into a round hole.

With that guidance in mind, we consider a series of congressional acts related to Section 81—specifically, Sections 465, 2719 and 271—that clearly avoid an "awkward" rendering of Section 81.

Sections 465 and 2719 are particularly instructive, for they respond directly to the dissent's concern that construing Section 81 so that it applies only to contracts involving lands already in trust would allow parties to evade federal review entirely. Manipulative parties, the dissent fears, could take advantage of such an interpretation by carefully orchestrating the timing of any agreement so that any provision encumbering Indian lands would be executed only before placing land in trust. But such fears are more than adequately assuaged by the existence of Sections 465 and 2719, both of which guarantee that a contract such as the one that NGV and the Tribe had entered into can never escape the federal government's attention.

First, Section 465 (already quoted in n.4) and its implementing regulations set forth an extensive review process that the Secretary of the Interior must undertake *before* taking lands into trust (see, e.g., 25 C.F.R. § § 151.3, 151.11(c); Larry E. Scrivner, *Acquiring Land into Trust for Indian Tribes,* 37 NEW ENG. L. REV. 603, 606-07 (2003)("Scrivner"),[11] describing the trust application process and the Secretary's duty to investigate, among other things, the purpose for which the land will be used and the effect that placing the land into trust will have on the

[11] At the time Scrivner authored that piece, he was serving as acting director of the Bureau's Office of Trust Responsibilities.

tax bases of local government; Mary Jane Sheppard, *Taking Indian Land Into Trust,* 44 S.D. L. REV. 681, 687-88 (1998-99) ("Sheppard"),[12] similarly describing the comprehensive nature of a Section 465 review). During such a review a tribe is first required to address, among other issues, its need for the land, the purpose for which the land will be used, the effect that taking the land into trust would have on state and local political subdivisions and whether a decision to take the land into trust would comply with the National Environmental Policy Act (see Scrivner, 37 NEW ENG. L. REV. at 606). With that initial information in hand, the Department of the Interior then gives state and local governments the opportunity to object to the tribe's application through "evidentiary documentation" demonstrating why taking the land into trust would "impact[ ] their jurisdiction or their tax base" *(id.* at 607). Only after all sides have provided their input does the Department begin its own independent examination of the trust application, a process that "requires a thorough analysis of all the facts and documentation, environmental clearances, archaeological studies, and all of the things that weigh into the action" *(id.).* Any final decision is subject both to a similarly extensive administrative appeals process and to a subsequent review in the federal courts *(id.).*

And relatedly, in cases where the tribe intends to use lands transferred into trust for gaming purposes, Section 2719(b)(1)(A) requires that the Secretary first "determine[ ] that a gaming

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[12] Sheppard has previously served as a staff attorney for the Gaming Commission and for the Division of Indian Affairs, Office of the Solicitor in the Department of the Interior.

establishment . . . would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community" (see also Sheppard, 44 S.D. L. REV. at 687). In short, any concern that NGV was trying to game the system by executing its contract with the Tribe before transferring land into trust is wholly unfounded. Instead any *later* effort to take lands into trust triggers an extensive review process by the Secretary—a review that is far more meaningful than any Section 81 proceeding that would deal with not-yet-identified lands that might be taken into trust in the future, because a Section 465 proceeding addresses the suitability of a *specific* parcel of land in *all* respects, rather than the totally speculative process that is necessarily involved when a presently unknown future acquisition is sought to be made the subject of an attempted analysis.

Sections 2710(d)(3)(A) and 2710(d)(7) also help illuminate the meaning of Section 81, particularly because both are part and parcel of IGRA, which defines "Indian lands" in much the same manner as Section 81 (see Section 2703(4)(B) (emphasis added), defining "Indian lands" in part as "any lands title to which *is* held in trust by the United States for the benefit of any Indian tribe . . ."). Section 2710(d)(3)(A) provides:

> Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the

conduct of gaming activities.

If any State should fail to enter into such negotiations, Section 2710(d)(7) provides the Indian tribe with a series of remedies, including the right to initiate an action against the State in federal district court. But to bring such an action, as the Sixth Circuit has held in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler,* 304 F.3d 616, 618 (6th Cir. 2002), the Indian tribe must show that it has "Indian lands" as defined by IGRA at the time of filing. *Match-E-Be-NashShe-Wish, id.* spelled out the rationale underlying its conclusion in terms that bear considerably on the Section 81 question now before us:

> Under § 2710(d)(3)(A), it is clear that the State does not have an obligation to negotiate with an Indian tribe until the tribe has Indian lands. The purposes of this requirement appear to be to ensure that the casino will be inside the borders of the State, to give the State notice of where it will be, and to require the tribe to have a place for the casino that has been federally approved. If the Indian tribe does not have any land in the State that can be used for a casino, why should the State waste its time negotiating about such a casino? In the absence of a location, the State would have no way to assess the environmental, safety, traffic, and other problems that such a casino could pose.

Accord, *Mechoopda Indian Tribe of Chico Rancheria, Cal. v. Schwarzenegger,* No. Civ. S-03-2327 WBS/GGH, 2004 WL 1103021, at *5 (E.D. Cal. Mar.

12, 2004).

Given those practical concerns, it is no wonder that the Bureau's policy has been to review contracts under Section 81 only when they involve lands currently held in trust by the United States. That policy is evinced by the Bureau's own April 13, 2005 letter to the Tribe, which made clear that its conclusion that the NGV-Tribe agreement was invalid for lack of Section 81 approval was predicated on the Tribe's lawyers having alerted the Bureau to its Mendocino County property, not to the possibility of acquiring future trust lands.[13]

That same policy is further confirmed through an affidavit included in the record by NGV from Kevin Gover ("Gover"), a former Assistant Secretary for Indian Affairs. Gover attests that during his tenure from late 1997 to early 2001, "it was not the [Bureau's] policy or practice to review contracts to determine whether such contracts fall within the scope of 25 U.S.C. §81(b) . . . in the absence of the existence of trust lands." Instead, in cases "where the

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[13] In that letter the Bureau wrote that "[a]t an earlier stage of our review, it was not clear whether the United States held title to any land in trust for the benefit of the Tribe, and, *as a consequence*, whether the agreements covered any 'Indian land' as defined in 25 U.S.C. §81(a)" (emphasis added)). Thus the Bureau concluded that Section 81 applied to NGV's contract with the Tribe only after "[a]ttorneys for the Tribe . . . provided [the agency] with documents showing that the United States accepted at least three parcels in Mendocino County, California, into trust for the benefit of the Tribe in 1999." If the Bureau had viewed Section 81 as applying to contracts involving lands that would *later* be transferred into trust, the existence of the Mendocino County property would have been irrelevant to its analysis of the NGV-Tribe contract.

purpose of the contract between a developer and a tribe [was] to assist the tribe in acquiring real property, and petitioning the United States to accept title to such property in trust for the benefit of the tribe," the Bureau's review would be done pursuant to the regulations implementing Section 465. As Gover puts it: "[t]he Secretary's acceptance of title to the subject property in trust for the petitioning tribe subsumes all approvals required under Federal law." And as all of that applies to the facts before us, the fact that the Tribe and NGV would eventually have to undergo Section 465 review if their later-acquired lands were to be transferred into trust obviated any need to have their contract approved under Section 81.

**[8]** In conclusion, there is no reason to resort to the Dictionary Act's default rules of statutory interpresentation. Instead the context here clearly indicates that Section 81 is limited only to reviewing those contracts involving presently held trust lands.

### C. Legislative History of Section 81

Our literal reading of Section 81 is further corroborated by the statute's legislative history.[14] In

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[14] To be sure, *Rowland*, 506 U.S. at 199 does not treat legislative history as part of the "context" of a congressional act as that word is used in the Dictionary Act. But legislative history of course remains a frequently relied-upon additional tool of statutory interpretation (see, e.g., *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1111 (9th Cir. 2007), explaining that its plain-language interpretation of the statute at issue was also "supported by legislative history"). And it seems particularly appropriate to consider the legislative history of Section 81 here, when each of the parties has sought to bolster its arguments with that information.

seeking to persuade us to read Section 81 other than in plain-language terms, Harrah's points to some cases that, it claims, identify a legislative history of Section 81 that supports a nonliteral reading. We have reviewed those cases as well as the pertinent legislative history, and we conclude that those sources not only fail to support the position advanced by Harrah's but that they instead further corroborate our own plain-language statutory reading.

Thus Harrah's seeks to call to its aid *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985), but that case significantly couched its view in terms that federal statutes relating to Indian tribes "are to be construed liberally in favor of the Indians, *with ambiguous provisions interpreted to their benefit"* (emphasis added). Here that proposition does not aid Harrah's, for Section 81's present-tense wording leaves no room for ambiguity.[15] Indeed, even the *Blackfeet Tribe* concept of liberal construction "in favor of the Indians" does not call for a nonliteral reading of Section 81(b), for requiring that more—rather than fewer—contracts be approved under Section 81(b) "would frustrate Indian tribes' efforts to

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[15] Even less (if indeed any) weight is to be ascribed to the comparable language employed in *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians,* 789 F.2d 785 (9th Cir. 1986), also sought to be relied on by appellees. *A.K. Mgmt.* involved an earlier and substantively different version of Section 81—one that did not speak of "encumber[ing] Indian lands," but rather of agreements made with Indians that were "relative to their lands" (see 25 U.S.C. §81 as it existed until the year 2000). Moreover, *A.K. Mgmt.* involved a dispute over land that was already held in trust by the United States for an Indian tribe. For more than one reason, then, that case does not at all influence today's outcome.

promote economic development and fiscal autonomy" *(Penobscot Indian Nation v. Key Bank of Me.*, 112 F.3d 538, 554 (1st Cir. 1997), adding that the court's "analysis reflects the modern trend in federal Indian policy away from outmoded paternalistic practices and policies").

Section 81's own evolution confirms the advent of that more modern attitude toward Indian tribes, a perspective that the dissent does not acknowledge. That statute was originally enacted in 1872 to "reflect[ ] Congressional concerns that Indians, either individually or collectively, were incapable of protecting themselves from fraud in the conduct of their economic affairs" (see S. REP. NO. 106-150, at 2 (1999), adding that "[t]he first and principal need then was that [Indians] should be shielded alike from their own improvidence and the spoliation of others"). But in 1934 Congress shifted the focus of its Indian policy by enacting the Indian Reorganization Act ("Reorganization Act") that "represented a fundamental break with [the] policy" underlying Section 81 (see *id.*). As the 1999 Senate Report, *id.* (alteration in original and internal quotation marks omitted) went on to say:

> The intent and purpose of the [Reorganization Act] was to develop the initiative destroyed by a century of oppression and paternalism . . . . [It] seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property.

Following passage of the Reorganization Act, administrative agencies and courts were left "with

the difficult task of reconciling an 1872 statute that sought to protect Indian tribes by imposing extensive federal oversight with a 1934 Act intended to disentangle the tribes from official bureaucracy" *(id.* (internal citation omitted)). Fortunately Congress simplified that task in 1999 when it amended Section 81. Those amendments—which, among other changes, replaced the term "relative to" Indian lands with "encumbers" Indian lands[16]— "ensure[d] that Indian tribes will be able to engage in a wide array of commercial transactions without having to submit those agreements to the BIA as a precaution" *(id.* at 9; see also *id.*, expressly noting that the 1999 amendment "eliminated the overly-broad scope" of Section 81).

**[9]** Put simply, the tables have turned since 1872. Although at an earlier point courts may have been able to use the *Blackfeet Tribe* presumption to justify a nonliteral expansion of Section 81, certainly the most recent amendment to that statute makes clear that Congress now considers self-determination—not paternalism—to be in the Indians' best interest. And that goal is more directly advanced by a literal rather than a nonliteral reading of Section 81.

### D. Language of the Lease and Mendocino County Property

With all of that said, we turn now to the actual language of the Lease to demonstrate that under the literal present-tense reading of Section 81, it does not apply to the only lands that the United States already held in trust for the Tribe's benefit at the

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[16] See n. 15.

time the Tribe-NGV agreement was entered into. Taking issue with our addressing the specifics of the contract, the dissent argues that this is a task best left in the first instance to the district court, particularly when "parol evidence" is involved. But our reading is based on the words of the contract itself (see n.17), and contract interpretation has always been a matter of pure law that needs no preliminary screening by the district court. And our reference to the contract directly addresses Harrah's argument—indeed the primary one that it has raised on appeal—that the Lease implicates the Mendocino County, California property already held in trust for the Tribe. Because it is exceedingly plain that neither the Tribe nor NGV ever contemplated that the document would extend to the Mendocino County lands, we hold that the agreement binding those two parties was valid without the Secretary's approval.

It is of course true that the Tribe's 44 acres in Mendocino County qualify as "Indian lands" as that term is defined by Section 81. And it is equally true that such acreage was taken into trust by the United States for the benefit of the Tribe in 1999, well before NGV and the Tribe formalized their business relationship. But the Mendocino County land issue is really a red herring: Both the unambiguous language of the Lease and, at least as importantly, the equally unambiguous facts as to that property itself confirm that the Mendocino County lands are not at all within the purview of the parties' transaction and were therefore not even arguably encumbered by the Lease.

**[10]** Under the terms of the Lease, NGV and the Tribe partnered not to develop a casino on

*existing* tribal land, but because the Tribe "require[d] assistance . . . *acquiring real property and petitioning the United States to accept title to such property in trust* for the benefit of the Tribe" (emphasis added). With the Mendocino County property already in hand —and having been accepted into trust—when the parties entered into their deal, the Lease cannot fairly be read as providing (or even contemplating) that such property would or could become the eventual site of the casino. It would make no sense at all, of course, to speak of "acquiring" already-owned real property. And it must be remembered that the Mendocino County property had been acquired expressly for residential development, *not* for commercial development. Nothing suggests that such purpose had changed in any respect either before or at the time that NGV and the Tribe entered into their agreement.

Additional language from the Lease further supports our conclusion. According to the Lease's "Master Definitions List," "Trust Lands" is described as:

> Property held by the United States in Trust for the benefit of the Tribe.

"Property" is in turn defined in terms of the future, not the present (emphasis added):

> The real property upon which the Structure *will be constructed* by Developer, which *at the time of construction will be titled to the United States in trust for the benefit of the Tribe.*

"Structure" is similarly defined as:

> The buildings and improvements

> constructed and installed on the Trust Lands on which the Tribe operates the Facility.

And finally, "Facility" is defined as:

> The Structure, equipped and ready for the Tribe to conduct Gaming for the public.

**[11]** With that definitional chain, the Lease provision sought to be relied on by Harrah's cannot reasonably be read as embracing the Tribe's acreage in Mendocino County. If that were to be done, "Property" would not be defined only in the future tense and "Structure" and "Facility" would not be defined in terms of a public gaming facility rather than private housing. In short, because the Mendocino County property was already held in trust and because it had been specifically slated—and remained slated—for residential development, that property simply does not come within the provision of the Lease restricting the Tribe's ability to alienate "Trust Lands."[17]

### E. Inapplicability of Section 2710

**[12]** To this point we have demonstrated in a number of different ways why Section 81 is inapplicable to the situation before us. But finally we soldier on to speak far more briefly to the

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[17] It is worth noting that NGV maintains that a deposition of Sanchez, which is included in the record, further bolsters its position that the parties never intended their agreement to cover the Mendocino County property. On appeal the parties have vigorously disputed whether we should consider such parol evidence in interpreting their agreement. Because of the clarity of the matters already discussed, we have felt no need to look to the deposition and, as a result, no need to resolve the parties' disagreement over the propriety of parol evidence.

substantially more attenuated possibility that the parties' agreement could somehow have violated Section 2710. As before, that inquiry begins by recourse to the plain statutory language. And by its express terms, Section 2710 pertains only to tribal ordinances or resolutions—not to a tribe's contract with a third party—so that nothing in that statute impairs the validity of the Tribe-NGV agreement.

Under Section 2710(b)(2)(A)(emphases added) the Chairman of the Gaming Commission:

> shall approve *any tribal ordinance or resolution* concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if *such ordinance or resolution* provides that—
>
> > (A) . . . . the Indian tribe will have the *sole proprietary interest* and responsibility for the conduct of any gaming activity . . .

On appeal Harrah's argues that NGV's agreement with the Tribe violated that statute because the terms of the Lease allowed NGV to assume the dominant equity interest in the eventual gaming facility. That arrangement, it contends, is concomitant to NGV having a "sole proprietary interest" in the gaming facility.

**[13]** But Section 2710's plain language refutes that notion because Harrah's conclusion rests on a false premise. Here there was no "tribal ordinance or resolution" (note that the statute's implementing regulations likewise refer to "gaming ordinance or resolution *adopted by a tribe*" (see 25 C.F.R. § 522.1 (emphasis added)). That language simply does not

speak to *contracts* entered into between a tribe and a third party (as contrasted with tribal legislation or regulations officially enacted by the tribe). That reading is further fortified by the sharp contrast between Section 2710 and Section 2705(a), a related statute that speaks of *both* "tribal ordinances or resolutions" and a specific type of contract that a tribe may enter into with a third party.[18] Thus the Tribe's agreement with NGV cannot be said to violate Section 2710 either.[19]

## V. Conclusion

We first vacate the judgment in the Tribe's declaratory judgment action against NGV and dismiss that action for lack of subject matter jurisdiction. As the Tribe's contracts with both NGV and Harrah's have been rescinded, there is no "case or controversy" at issue as between the Tribe and NGV, leaving us with no federal jurisdiction on that score.

**[14]** We further hold that Section 81 requires approval by the Secretary as to only those contracts

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[18] Under Sections 2705(a)(3) and (4)(emphases added) the Chairman of the Gaming Commission can:

> (3) approve *tribal ordinances or resolutions* regulating class II gaming and class III gaming as provided in section 2710 of this title; and
>
> (4) approve *management contracts* for class II gaming and class III gaming as provided in sections 2710(d)(9) and 2711 of this title.

[19] We note that nothing in the record indicates that the Tribe forwarded a tribal ordinance or resolution to the Gaming Commission for it to review, or even that any such ordinance or resolution existed. Instead the record reflects that the Tribe's chairperson forwarded the Lease and Cash Management Agreement to the agency.

that implicate lands already held in trust by the United States for an Indian tribe. Because the contract between the Tribe and NGV did not implicate such lands, it remained valid without such approval. We further hold that the same contract also did not violate Section 2710, for that statute pertains only to tribal ordinances and resolutions, not to a tribe's agreement with a third party. All of those things being true, we reverse the judgment in Harrah's favor and remand for resolution of NGV's action against Harrah's on the merits.

**VACATED IN PART; REVERSED AND REMANDED IN PART.**

N.R. SMITH, Circuit Judge, dissenting:

I respectfully dissent for the following reasons. First, the majority rejects the clear and unambiguous will of Congress in its application of 25 U.S.C. § 81. Second, because of its error in the application of 25 U.S.C. § 81, the majority is thereafter forced to reverse the district court by (1) interpreting contracts that the district court did not review; (2) making its own determination that the contracts were unambiguous; (3) using parol evidence to interpret the contract even though it finds that the contracts were unambiguous; and (4) picking and choosing which parol evidence on which to rely, even though the district court had not addressed the issues of whether to admit parol evidence and, if so, what evidence to admit. I would instead affirm the district court's summary judgment decision dismissing NGV's tortious interference complaint against Harrah's and dismiss the appeal for declaratory relief filed by the Tribe as moot.

## I.

"The doctrine that the federal government stands in a fiduciary relationship to Native Americans has been a part of our common law since the early days of the Republic." *Eric v. Sec'y of HUD*, 464 F. Supp. 44, 46 (D. Alaska 1978) (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831)). "Over the years courts at all levels have sustained the doctrine that in its relations with Native peoples the government owes a special duty analogous to those of a trustee." *Id.* (citing *Heckman v. United States*, 224 U.S. 413 (1912); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Redfox v. Redfox*, 564 F.2d 361, 365 (9th Cir. 1977); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973)). This is a "unique relationship between Indians and the federal government, a relationship that is reflected in hundreds of cases and is further made obvious by the fact that one bulging volume of the U. S. Code pertains only to Indians." *Id.* (quoting *White v. Califano*, 437 F. Supp. 543, 555 (D.S. D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978)).

Consistent with this special duty, Congress enacted 25 U.S.C. § 81 "to protect the Indians from improvident and unconscionable contracts" in 1872. *In re Sanborn*, 148 U.S. 222, 227 (1893). Since that time, Congress has amended § 81, removing provisions that were antiquated and unnecessary. *See* H.R. Rep. 106-501. The present language of § 81(b) states:

> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid

> unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

The term "Indian lands" is defined by § 81(a) as: "lands the title to which is held by the United States in trust for an Indian tribe." 25 U.S.C. § 81(a). (hereafter referred to as "trust lands"). To decide this case, we must apply § 81 to the parties' contracts.

"In interpreting a statute, we look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *United States v. Middleton,* 231 F.3d 1207, 1210 (9th Cir. 2000) (quoting *United States v. Mohrbacher,* 182 F.3d 1041, 1048 (9th Cir. 1999)). When a statutory term is undefined, we endeavor to give that term its ordinary meaning. *Id.* We are instructed to avoid, if possible, an interpretation that would produce "an absurd and unjust result which Congress could not have intended." *Id.* (quoting *Clinton v. City of New York,* 524 U.S. 417, 429, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998)).

In the Dictionary Act, Congress mandated that, in determining the meaning of any Act of Congress, "unless the context indicates otherwise . . . words used in the present tense include the future as well as the present." 1 U.S.C. § 1. Thus, when interpreting the definition of "Indian lands" in § 81, we must read the words "which is held in trust . . ." to also include land "which will be held in trust . . . ." *Id.*

Recent Congressional discussion of the purpose of § 81 supports such a reading. Section 81 "is intended to protect Indians from improvident

contracts and is concerned primarily with federal control over contracts between Indian tribes or individual Indians and non-Indians." *See* H.R. Rep. 106- 501. Congress clearly does not want Indian tribes to enter into contracts that would encumber their trust lands for seven years or more, without the added protection of the Secretary of the Interior's approval. Limiting § 81's definition of Indian lands to only the present tense — land which *"is* held in trust" — undermines the protection § 81 is intended to provide to the Indian tribes. Under the majority's reading of § 81, parties can easily circumvent the statute. The parties, fully intending that their contract will encumber Indian lands for more than seven years, can simply execute their contract before the lands are conveyed into trust. Because such a contract would not pertain to land *presently* held in trust by the United States for an Indian tribe, the contract would not require the approval of the Secretary of the Interior. This would be true even though the parties always intended that the land would be held in trust by the United States for the Indian tribe and even if the contract contained an explicit provision requiring that the land be held in trust by the United States for the Indian tribe.

Longstanding Supreme Court and Ninth Circuit precedent concerning the regulation of Indian land transactions also supports reading § 81 to include the future tense. The United States Supreme Court has made clear that "the canons of construction applicable to Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). One of those cannons of construction is that federal statutes relating to

Indian tribes must be "construed liberally in favor of the Indians." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). This court has previously written, "Until Congress repeals or amends the Indian . . . statutes . . . we must give them a 'sweep as broad as [their] language' and interpret them in light of the intent of the Congress that enacted them." *A.K. Management Co. v. San Manuel Band of Mission Indians,* 789 F.2d 785, 787 (9th Cir. 1986) (quoting *Central Machinery Co. v. Arizona State Tax Commission,* 448 U.S. 160, 166 (1980)). Reading § 81 to include the future tense furthers both the intent of Congress and the direction of the Supreme Court that we must construe statutes broadly in favor of the Indian tribes.

Applying the plain language of § 81 to the contract between the Tribe and NGV is a straightforward exercise. The Tribe and NGV entered into contracts regarding lands which are or will be held in trust for seven or more years. Based upon the provisions of § 81, the Tribe applied for approval of these contracts. However, the Secretary of the Interior did not approve the contracts. Thus, under the plain language of § 81, they are invalid. 25 U.S.C. § 81. Because the contracts are invalid, NGV cannot establish the first element of its tortious interference cause of action against Harrah's. *Quelimane Co. v. Stewart Title Guaranty Co.,* 960 P.2d 513, 530 (Cal. 1998) (stating that the first element of an intentional interference with contractual relations action is "a valid contract between plaintiff and a third party").

To contradict this clear and unambiguous reading of § 81, the majority first declares that the Dictionary Act only applies when a statute is

ambiguous. However, the majority cites no authority for this argument, because there is none. Congress enacted the Dictionary Act and installed it as its first act, 1 U.S.C. § 1, controlling the meaning of the words of any and all Acts of Congress. Nothing in the United States Code or controlling precedent limits the Dictionary Act's application.

Understanding the weakness of their argument, the majority next seizes upon the language of the Dictionary Act and argues that the context of the § 81 precludes the use of the future tense. Context is "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Rowland v. California Men's Colony*, 506 U.S. 194, 199 (1993). However, the words of § 81 do not provide a different context. There is no finding in the majority opinion or arguments in the briefs of the parties suggesting that the words of the statute surrounding "which is held" provide a different context. Instead, the majority suggests that 25 U.S.C. §§ 465, 2710, and 2719 (other congressional acts) provide the "context" to reject reading § 81 to include the future tense, as mandated by the Dictionary Act. Again, the majority cites no Supreme Court or circuit precedent to buttress their argument that these sections were enacted to change the context of § 81.

The sections cited by the majority provide additional protections to the Indian tribes and their lands, but provide no support for the proposition that the Dictionary Act should not apply to § 81. However, Congress can pass more than one Act to assist Indian tribes. Section 81 applies to all contracts and agreements with Indian tribes which encumber

Indian trust lands. Under § 81, the Secretary must determine: (1) whether the contract will encumber presently held or to be acquired trust land for a period of seven or more years; and (2) whether the contract is improvident and unconscionable. 25 U.S.C. § 81. None of the language in sections 465, 2710, or 2719 even addresses contracts encumbering Indian lands, much less provides a context suggesting that § 81 can include only the present tense.

Section 465 authorizes the Secretary "to acquire . . . any interest in lands, water rights, or surface rights to lands within or without existing reservations . . . for the purposes of providing land for Indians." 25 U.S.C. § 465. Nothing in that section even remotely addresses determining the fairness of contracts, between Indian tribes and some other party, which will encumber Indian lands. *Id.; see also* 25 C.F.R. §§ 151.10, 151.11. Section 2701 *et seq.*, which includes § 2710, applies to the approval of gaming contracts, not contracts encumbering Indian lands. Additionally, these sections use a different definition of the term "Indian Lands" than does § 81. Indian lands under these sections includes "all lands within the limits of any Indian reservation *and* any lands to which title is either held in trust by the United States . . . or held by any Indian tribe or individual subject to restrictions by the United States . . .over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4) (emphasis added). Section 2719(b)(1)(A) is likewise limited to gaming contracts, and requires the Secretary to determine whether a gaming establishment would be in the best interest of the Indian tribe and whether it would be detrimental to the surrounding community. 25 U.S.C. §

2719(b)(1)(A).

The majority next argues that Congress could have drafted § 81 to include the future tense, if that were its intent. However, the Dictionary Act provides that all present tense words used in Acts of Congress include the future tense. *See* 1 U.S.C. § 1. Because we presume that Congress is knowledgeable about existing law when it passes new legislation, we must presume that Congress was aware of the Dictionary Act when it enacted § 81. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Thus, there is simply no reason for Congress to draft a statute with language in both present and future tense. In fact, drafting in this way would be illogical given that the Dictionary Act already addresses the future tense in "any Act of Congress." 1 U.S.C. § 1.

The majority's opinion also implies that the statutory language in the Dictionary Act is hoary, because the Supreme Court has only applied the Dictionary Act to illustrate the meaning of the word "person." Acts of Congress, however, are not presumed invalid until declared so by the Supreme Court. Simply because the Supreme Court has not yet addressed this issue does not affect the application of the Dictionary Act to the facts of this case.

Lastly, the majority relies on what it terms a "more modern attitude toward Indian tribes" to justify its reading of § 81. However, our job is not to legislate to reflect modern attitudes. Our job is, instead to interpret statutes as they have been written. It is Congress's place, not ours, to decide whether modern attitudes dictate that § 81 be repealed (as this opinion does). Until the time that Congress does so, we are bound by the current

language of § 81.

The contracts between the Tribe and NGV are subject to § 81 and require approval by the Secretary of the Interior. Because the contracts were not approved, the contracts were invalid and unenforceable. NGV's tortious interference cause of action therefore fails and must be dismissed.

II.

The Tribe and Harrah's filed summary judgment motions, asserting that the language of the contracts between the Tribe and NGV encumbered presently owned trust lands thereby requiring Secretary approval under § 81. NGV opposed the motion, also citing the language of the contracts. Thereafter, NGV requested permission to file a surreply to provide the court with additional evidence in support of its position that the contracts did not encumber trust lands. Both Harrah's and the Tribe opposed the motion and, alternatively, requested that they be able to respond to NGV's surreply, if it were allowed. The district court refused to allow the surreply. However in its refusal, the district court noted, "The Court has reviewed the surreply filed by NGV. The Court finds that NGV has submitted evidence concerning issues of fact.

Because the Court bases its decision on an issue of law, it finds it unnecessary to address the contentions contained in the surreply." *Guidiville Band of Pomo Indians v. NGV Gaming Ltd.*, 2005 WL 5503031 at 1, n.1 (N.D. Cal. 2005). Given these circumstances, it is error for this court to pick and choose what parol evidence it will use in reversing the district court's decision on an issue that the district court did not even address. Instead, we

should remand this issue to the district court so that it may make a factual finding regarding whether the terms of the contracts between the Tribe and NGV are ambiguous.

A.

In interpreting a contract under California law, a court must first look to the plain meaning of the contract's language. *See* Cal. Civ. Code §§ 1638, 1644. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible[.]" Cal. Civ. Code § 1639. California law holds that "even if the trial court personally finds the document not to be ambiguous, it should preliminarily consider all credible evidence to ascertain the intent of the parties." *Appleton v. Waessil,* 32 Cal. Rptr. 2d 676, 678 (Cal. Ct. App. 1994). In such cases, the district court engages in a two-step process: "First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step-interpreting the contract." *Winet v. Price,* 6 Cal. Rptr. 2d 554, 557 (Cal. Ct. App. 1992).

The district court had no opportunity to interpret the language of these contracts. Instead, it decided a question of law regarding § 81. Because the district court acknowledged that factual issues exist with regard to the contracts' interpretation, the district court is in a better position to "make these

determinations in the first instance." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Notwithstanding that the district court never reached the analysis set forth in *Winet*, the majority finds that the language of the Tribe/NGV Lease is unambiguous. However, in doing so, the majority picks and chooses what parol evidence it will consider rather than remanding to the district court so that it may determine, in the first instance, whether the terms of the contract are ambiguous. For example, the majority uses parol evidence to (1) ascertain that neither of the parties ever contemplated that the Lease would extend to already owned trust land (the Medocino County property); and (2) state that "equally unambiguous facts as to that property itself confirm that the Medocino County lands are not at all within the purview of the parties' transaction." The majority also cites to the Bureau of Indian Affairs letters to buttress its finding regarding the language of the Lease.

I reject the idea that appellate courts may rely upon parol evidence which was not fully presented by the parties to the district court in order to reverse the district court. An appellate court's application of parol evidence to interpret contractual terms is not a substitute for a full hearing before the district court in which the district court can consider all of the evidence. This is particularly true under California law, which requires a district court to first make a finding about whether the contract is ambiguous and allows the admission of parol evidence only if the contract is, in fact, ambiguous. *See Winet*, 6 Cal. Rptr. 2d at 557. If the contract is unambiguous, an appellate court should interpret the contract based on

its language alone. Cal. Civ. Code § 1639. It is not appropriate for appellate courts to make a determination in the first instance about whether the contract is ambiguous and it is even less appropriate for appellate courts to determine what parol evidence, if any, to consider. Therefore, I would remand to the district court for it to make a determination in the first instance as to whether the contracts between the Tribe and NGV are ambiguous, and, if so, what parol evidence to admit. This is consistent with the process provided for by California law. *See Winet,* 6 Cal. Rptr. 2d at 557; *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.,* 442 P.2d 641, 644 (Cal. 1968) ("The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.")

**B.**

The majority also ignores the rules of contract interpretation in reaching its result. Section 81's plain language requires any contract encumbering Indian lands for a period of seven years or more to get approval. 25 U.S.C. § 1. There is no dispute that the Lease "encumbers" land which the lease defines as "Trust Lands." *See* 25 C.F.R. § 84.002 ("Encumber means to attach a claim, lien, right of entry or liability to real property"). Pursuant to the terms of the Lease, so long as any of the Tribe's obligations to NGV remain outstanding, the Tribe cannot sell, dispose of, lease, assign, sublet, transfer, mortgage or encumber all or any part of its title, or interest in or to the "Trust Lands," as defined in the parties'

contracts, without the prior written consent of NGV. The Lease also grants NGV, its agents, employees, and independent contractors a right of entry on Indian trust lands, with "complete and unrestricted access . . . for purposes of developing, installing and constructing the Structure." Thus, we must determine whether the defined term "Trust Lands" used in the Lease encompasses Indian lands such that § 81's approval requirement would apply.

In the parties' Master Definitions List, which applies to both the Lease and the parties' other contract, the parties defined the term "Trust Lands" as "Property held by the United States in Trust for the benefit of the Tribe." Applying § 81 to this definition, the Lease encumbers Indian lands. The Lease's definition of "Trust Lands" includes all of the property held by the United States in trust for the benefit of the Tribe, with no exceptions. Thus, even if the majority is correct that § 81 only applies to lands *presently* held in trust, the Lease encumbers such land. Thus, the Lease needed to be approved by the Secretary of the Interior. 25 U.S.C. § 81(b). Because it was not, the Lease is invalid.

The majority attempts to skirt § 81's approval requirement by suggesting that the Lease's definition of "Trust Lands" only applies to property which will be acquired in the future. The majority asserts that the sequence in which terms are defined in the Master Definitions List makes it clear that the use of the word "Property" in the definition of "Trust Lands" is limited to the defined term "Property," which is also included in the Master Definitions List. Thus, the majority believes that the term "Trust Lands" includes only the specific land to be acquired for

construction of the casino. The majority relies upon the fact that the word "Property" is capitalized in the definition of "Trust Lands," but ignores the context and use of the term "Trust Lands" within the contracts themselves.

It is well settled that a contract should be interpreted so as to give meaning to each of its provisions. "Since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous." *BrindersonNewberg Joint Venture v. Pacific Erectors, Inc.*, 971 F.2d 272, 278-79 (9th Cir. 1992) (quoting Restatement (Second) of Contracts § 203(a) cmt. b (1979)). The majority's reading of the Lease renders the defined term "Trust Lands" meaningless. The defined term "Property" includes "real property upon which the Structure will be constructed by Developer, which at the time of construction will be titled to the United States in trust for the benefit of the Tribe." This term already requires that the land acquired for the casino be held in trust by the United States for the Tribe. The defined term "Trust Lands" includes "Property held by the United States in Trust for the benefit of the Tribe." If this definition only refers to "Property" as defined by the Master Definitions List, the two terms mean exactly the same thing. Thus, the term "Trust Lands" would be superfluous because it would not include any land not already covered by the definition of "Property."

Additionally, contracts should be interpreted to be "internally consistent." *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 872 (9th Cir. 1979) (applying California law). When the contract is unambiguous, the express language is to govern.

*Oracle Corp. v. Falotti*, 319 F.3d 1106, 1112 (9th Cir. 2003) (citing California law).

The majority reads only the Master Definitions List to determine what the term "Trust Lands" means, and ignores the plain language of the whole Lease, thereby making it "internally inconsistent." First, the majority overlooks the fact that the first letter of every definition in the Master Definitions List is capitalized. Thus, the fact that "Property" is capitalized in the definition of "Trust Lands" has no significance. Neither the Lease nor the parties' other contract has language indicating that the word "Property," the first word of the definition of "Trust Lands," refers only to the term as defined previously in the contracts. At best, the majority's reading of this language suggests an ambiguity in the contracts. An ambiguous contract cannot be interpreted without determining the intent of the parties. If this is the case, the matter should be remanded to the district court for such a determination.

Second, the majority ignores the remainder of the Lease, which makes clear that the term "Trust Lands" is not limited to property to be acquired in the future, and thus triggers the application of § 81. For example, section 14.1 of the Lease provides that the Tribe represents and warrants:

> F. There are no judgments filed or suits, actions, or proceedings pending, or to the knowledge of Lessee, Trust Lands or by any court, arbitrator, administrative agency, or other Governmental Authority which, if adversely determined, would materially and adversely affect the construction, development, or operation of the facility as

contemplated in the Transaction Documents.

It would be internally inconsistent to apply the majority's definition of "Trust Lands" to this provision. If the words "Trust Lands" refer only to yet to be acquired property on which the casino will be built, this paragraph is superfluous. The Tribe could not realistically make any of the required representations or warranties on land it had not yet acquired. Thus, at the time the Tribe and NGV entered into their contracts, section 14.1 of the Lease would have been meaningless.

Applying basic rules of statutory interpretation, the Lease clearly contemplates that the definition of "Trust Lands" includes *any* trust land of the Tribe, not just the property to be acquired for the Tribe by NGV in the future. Thus, the parties' contracts were undisputedly subject to approval by the Secretary of the Interior under § 81.

## III.

The Tribe also brought a declaratory judgment action to determine the validity of its contracts with NGV. The district court found that (1) it had subject matter jurisdiction over the declaratory relief action; (2) § 81 applied to the to-beacquired trust lands; and (3) because the Secretary of the Interior did not approve the contracts as required under § 81, the contracts were invalid. NGV appealed that decision.

As noted in the majority opinion, the Tribe entered into contracts with Harrah's after entering into the contracts with NGV. In the Harrah's/Tribe contracts, the Tribe specifically indemnified Harrah's against any lawsuit by NGV. While the appeal was

pending, the Tribe and Harrah's terminated their contracts and entered into a settlement agreement, wherein the Tribe agreed to continue to indemnify Harrah's against claims made by NGV. Based upon the termination and settlement, NGV on appeal asserts an additional argument, alleging that the declaratory judgment is moot (no case or controversy exists) because of the termination of the contracts. The majority agrees, because (1) the contracts between the Tribe and Harrah's were terminated; and (2) the underlying contracts between the Tribe and Harrah's were invalid because they were never approved. Although the Tribe entered into a settlement agreement, which required the Tribe to continue to indemnify Harrah's, the majority found that the settlement agreement was void for lack of consideration. I again disagree with the majority.

The parities[sic] dispute whether the Tribe's obligation to indemnify Harrah's survived the termination of the contracts, and therefore whether a case and controversy existed or continues to exist. Both the Management Agreement and the Development Agreement between Harrah's and the Tribe contained an indemnification clause. The clause states:

> ***Indemnity.*** To the fullest extent permitted by law, the Tribe shall indemnify Developer and its Affiliates against any claims relating to the development, management, or operation of the Casino of the Tribe by any person, . . . with which or whom the Tribe has had any business relationship, association, or dealing prior to the date hereof. This indemnification shall survive

> the termination of this Agreement for a period of three (3) years.

In addition, both of the contracts contained a severability clause stating in part:

> ***Severability.*** If any of the material terms and provisions hereof shall be held invalid or unenforceable, such invalidity or unenforceability shall not affect any of the other terms or provisions hereof.

Based upon the language in foregoing clauses in the contracts, there is a question of fact as to whether the termination of the contracts ended the Tribe's obligations to indemnify Harrah's. Even if the language in the contracts is not applicable, California law provides that:

> the compromise of a doubtful claim asserted and maintained in good faith constitutes a sufficient consideration for a new promise, even though it may ultimately be found that the claimant could not have prevailed. This is true whether the claim be in suit or not. . .

*Union Collection Co. v. Buckman,* 88 P. 708, 710 (Cal. 1907).

California law further provides that partially illegal contracts may be upheld if the illegal portion is severable from the part which is legal. *Mailand v. Burckle,* 572 P.2d 1142, 1152 (Cal. 1978) (severing a contract void under the Cartwright Act). The issue of "whether a contract is entire or whether its various stipulations are to be regarded as severable is a question of construction." *Sterling v. Gregory,* 85 P. 305, 306 (Cal. 1906). Thus, to determine whether

provisions of otherwise illegal contracts have continued vitality, a court must examine "the language and subject-matter of the contract . . . according to the intention of the parties." *Pac. Wharf & Storage Co. v. Standard Am. Dredging Co.*, 192 P. 847, 849 (Cal. 1920). In determining the parties' intent, the court must consider "all the circumstances surrounding the making of the contract." *Sterling*, 85 P. at 306.

Because issues of fact have been raised with regard to the effect of the settlement and the validity of the Tribe/Harrah's contracts, "we must remand to the district court to conduct, as necessary, further evidentiary proceedings to resolve those issues." *Bank of New York v. Fremont Gen. Corp.*, 523 F.3d 902, 910 (9th Cir. 2008).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GUIDIVILLE BAND OF POMO INDIANS,

Plaintiff,

v.

NGV GAMING LTD., a Florida partnership,

Defendant.

NGV GAMING, LTD., a Florida partnership,

Plaintiff,

v.

UPSTREAM POINT MOLATE, LLC, a California limited liability company and HARRAH'S OPERATING COMPANY, INC., a Delaware corporation,

Defendants.

No. C 04-3955-SC
No. C 05-1605-SC

ORDER GRANTING PLAINTIFF GUIDIVILLE BAND OF POMO INDIANS' MOTION FOR DECLARATORY RELIEF

AND

ORDER DENYING PLAINTIFF NGV GAMING, LTD.'S MOTION FOR SUMMARY JUDGMENT

AND

ORDER DISMISSING CASE NO. C 04-3955-SC, NGV GAMING, LTD. v. UPSTREAM POINT MOLATE, LLC and HARRAH'S OPERATING COMPANY

## I. INTRODUCTION

Plaintiff NGV Gaming, Ltd. ("NGV") filed this action, Case No. 04-3955, against rival casino development groups Upstream Point Molate, LLC and Harrah's Operating Company, Inc. ("Defendants") alleging that Defendants tortiously interfered with NGV's contract with the Guidiville Band of Pomo Indians ("the Tribe").

The Tribe filed Case No. 05-01605 seeking declaratory and injunctive relief against NGV on the grounds that the underlying contracts are invalid. The two cases were consolidated.

The Tribe now moves for declaratory relief. Specifically, the Tribe asks the Court to issue an order declaring the Agreements to be invalid. NGV now moves for summary judgment.[1]

For the reasons set forth below, the Court hereby GRANTS the Tribe's motion for declaratory relief and DENIES NGV's motion for summary judgment and DISMISSES Case No. 04-3955.

## II. LEGAL STANDARD

The burden of proving the requirements for declaratory relief- i.e., the existence of a dispute on a matter within federal court subject matter jurisdiction - rests on the party seeking declaratory relief. State of Texas v. West Publishing Co., 882 F.2d

[1] The Court has reviewed the surreply filed by NGV. The Court finds that NGV has submitted evidence concerning issues of fact. Because the Court bases its decision on an issue of law, it finds it unnecessary to address the contentions contained in the surreply.

171, 175 (5th Cir. 1989).

The burden of proof as to the substantive right involved rests on whichever party holds the coercive claim - the true 21 plaintiff. See Sanchez-Martinez v. I.N.S., 714 F.2d 72 (9th Cir. 1983).

## III. BACKGROUND

On July 3, 2002, the Guidiville Band of Pomo Indians entered into a series of contracts (the "Transaction Agreements" or the "Agreements") with F.E.G.V. Corporation to develop and construct a proposed gaming facility on restored trust land in Northern California. Plaintiff NGV's Memorandum in Support of Opposition to Motion for Summary Judgment at 3 ("Pl. NGV's Mem."). NGV is the assignee of these contracts. Id. The Transaction Agreements consist of the Development Agreement and Personal Property Lease ("Lease") and a Cash Management Agreement ("CMA"). Id. NGV was obligated under the Transaction Agreements to assist the Tribe in identifying and purchasing land in order to establish the trust land base on which the gaming facility would eventually be built. Id.

In January of 2004, Defendants began negotiating to purchase 354 acres of land from an outside entity for the purpose of building a gaming facility. Id. at 4. According to NGV, Defendants were aware of the existing contracts between NGV and the Tribe, yet intended to put these lands into trust for the Tribe and build a gaming facility for the Tribe to operate. Id. at 4-5.

On August 2, 2004, the Tribe sent a letter to NGV in which it attempted to "rescind" the Transaction Agreements with NGV. Id. at 6. NGV

maintains that the reasons given for the rescission were "entirely pretextual" and that the Tribe was induced to terminate its agreements with NGV as a result of Defendants' interference. Id. at 6.

After termination of the contract, NGV filed its case, No. 04-3955, against Defendants, alleging tortious interference with a valid contract. Defendants filed a motion to dismiss NGV's complaint on the grounds that NGV failed to state a claim upon which relief can be granted. The Court denied this motion and granted the Tribe's motion to participate as an amicus curiae.

The Tribe filed Case No. 05-1605, seeking declaratory and injunctive relief. Defendants filed a motion for summary judgment in Case No. 04-3955.

## IV. DISCUSSION

Under the standard cited above, the Court finds that the Tribe, as the declaratory relief plaintiff, has established the existence of a dispute on a matter within federal court subject matter jurisdiction.

The Court further finds, under the above-stated standard, that NGV is the true plaintiff because it is trying to establish that the contracts are valid, therefore it possesses the "coercive" claim. Therefore, the Court's order will address NGV's contentions.

NGV contends that the Agreements are valid because 25 U.S.C. § 81 does not apply to the Agreements and the Agreements do not implicate or otherwise encumber Indian trust lands. Pl. NGV's Mem. at 9-10.

Under California law, the elements of a cause of action for intentional interference with contract are

1) a valid contract between plaintiff and a third party; 2) defendants' knowledge of the contract; 3) defendants' intentional acts designed to induce a breach or disruption of the contractual relationship; 4) actual breach or disruption of the contractual relationship; and 5) resulting damage. See Tuchsher Development Enterprises Inc. v.San Diego Unified Port District, 106 Cal.App.4th 1219 (2003).

A. Validity of the Transaction Agreements Under 25 U.S.C. § 81

NGV contends that because no lands were acquired and transferred into trust, it is not necessary to obtain regulatory approval of the Agreements by the Secretary of the Interior, or his designee, pursuant to 25 U.S.C. § 81(b)(2000). Pl. NGV's Mem. at 9-10.

That section of the statute provides:

> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

25 U.S.C. § 81(b). Regulations governing this section declare that a "contract or agreement that requires Secretarial approval under this part is not valid until the Secretary approves it." 25 C.F.R. § 84.007.

Apart from the fact that the land had not been acquired and converted into Indian trust land, the Agreement appears to fall squarely under the scope of Section 81. No one disputes that the to-be-acquired lands were to be converted into Indian trust lands. No

one disputes that the term was in excess of seven years.

NGV does not concede, however, that the unacquired lands would have been "encumbered" under Section 81. Pl. NGV's Mem. at 10. The Court, however, finds that the Agreements do encumber Indian trust lands within the meaning of the statute and the appropriate regulations. Under 25 C.F.R. § 84.002, "encumber" means to "attach a claim, lien, right of entry or liability to real property." The Agreements declare that the Tribe, so long as base rent for the gaming facility is payable[2], will not "[s]ell, dispose of, lease, assign, sublet, transfer, mortgage or encumber (whether voluntarily or by operation of law) all or any part of its right or interest in or to the Trust Lands" without the prior written consent of NGV. Declaration of Amy Wilkins ("Wilkins's Dec.), Ex. B at 26. Also, the Agreements grant NGV, its agents, employees, and independent contractors a right of entry, providing them with "complete and unrestricted access to the Indian trust lands for purposes of developing, installing and constructing the Structure."[3] Id. at 9.

NGV hangs its case on the fact that the lands had not yet been acquired, therefore rendering Secretarial approval unnecessary to a finding that a

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[2] That is, after the unacquired lands have been acquired, transferred into trust status, and the gaming facility has been built.

[3] The Master Definitions List attached to the Agreements defines "Structure" as the "buildings and improvements constructed and installed on the Trust Lands on which the Tribe operates the Facility." Wilkins's Dec., Ex. D. at 3. "Facility" is defined as the "Structure, equipped and ready for the Tribe to conduct Gaming for the public." Id. at 6.

valid contract existed. Pl. NGV's Mem. at 12. The Court does not find this contention convincing. Rather, the Court finds that Secretarial approval is a bar to the formation of a valid contract or agreement. See A.K. Management Company v. The San Manuel Bank of Mission Indians, 789 F.2d. 785, 789 (9th Cir. 1986). Therefore, the Agreements are invalid as a matter of law.

Ninth Circuit case law is clear on this issue. The Court of Appeals wrote:

> [I]t is doubtful that general contract principals apply to an agreement subject to 25 U.S.C. § 81 (1982). Section 81 explicitly provides that a contract is "null and void" without written approval from the BIA [Bureau of Indian Affairs]. Therefore it is logical to conclude that an agreement without BIA approval must be null and void in its entirety. No part of it may be enforced or relied upon unless and until BIA approval is given. BIA approval is an absolute prerequisite to the enforceability of the contract. To give piecemeal effect to a contract... would hobble the statute.

Id. Though this decision concerned Section 81 before it was amended in 2000 and dealt with a dispute over lands then held in trust for an Indian tribe, the Court's interpretation of congressional intent is clear: contracts that encumber Indian trust lands in excess of seven years are invalid unless and until BIA approval is given.[4] To enforce the Agreements

[4] Before 2000, § 81 declared that contracts "relating" to Indian trust land were "null and void" without BIA approval. 25 U.S.C. § 81 (1982). One reason Congress amended the statute is that

piecemeal, as NGV urges the Court to do, would hobble the statute and go against the protective intentions of Congress.

The federal government's longstanding policy of regulating Indian land transactions supports this reading of the applicability of the statute.[5] The United States Supreme Court has stated that federal statutes relating to Indian tribes must be "construed liberally in favor of the Indians." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985). Furthermore, Section 81 notifies all parties that any contract encumbering trust lands for seven years or more is invalid without BIA approval. The Agreement, by its own terms, recognizes the need to satisfy this requirement. Wilkins's Dec., Ex. B at 16.

Accordingly, the Court finds that the Agreements are invalid as a matter of law. Because the Agreements are invalid, NGV's claim for tortious interference with a valid contract cannot stand.

## V. CONCLUSIONS FOR CASE NO. C-04-3955 AND CASE NO. C-05-1605

For the foregoing reasons, the Tribe's motion

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parties disputed - and heavily litigated - the meaning of "relating to Indian lands" for many years. The Senate report on the 2000 amended version of Section 81 stated that Section 81 "will only apply to those transactions where the contract between the tribe and a third party could allow that party to exercise exclusive or nearly exclusive proprietary control over Indian lands." See Catskill Development, L.L.C., v. Park Place Entertainment Corporation, 144 F.Supp.2d 215, 223 (S.D.N.Y. 2001).

[5] A contract forming the base for a claim of tortious interference should not be "opposed to public policy, so that the law will not aid in upholding it." W. Page Keeton et al., Prosser and Keaton on Torts Section 129 at 995 (5th ed. 1984).

for declaratory relief in Case No. C-05-1605 is GRANTED. Because the granting of the Tribe's motion decides the central issue on which NGV's motion and case are based, NGV's motion for summary judgment is DENIED, and its case, C-04-3955, is hereby DISMISSED.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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GUIDIVILLE BAND OF POMO INDIANS,

Plaintiff - Appellee,

V.

NGV GAMING, LTD, a Florida partnership,

Defendant - Appellant.

No. 05-17066
D.C. No. CV-05-01605-SC
Northern District of California, San Francisco

**ORDER**

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GUIDIVILLE BAND OF POMO INDIANS,

Plaintiff,

and

NGV GAMING, LTD, a Florida partnership,

Plaintiff - Appellant,

V.

HARRAH'S OPERATING COMPANY, INC.;, a Delaware corporation,

Defendant - Appellee.

No. 05-17067
D.C. No. CV-05-03955-SC
Northern District of California, San Francisco

**ORDER**

Appellant's request for extension of time to file Petition For Rehearing and For Rehearing En Banc is granted. Appellant's Petition For Rehearing and Suggestion For Rehearing En Banc is due on or before July 17, 2008.

FOR THE COURT:

Molly C. Dwyer Clerk of Court

By: Gabriela Van Allen Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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GUIDIVILLE BAND OF POMO INDIANS,

Plaintiff - Appellee,

v.

NGV GAMING, LTD, a Florida partnership,

Defendant - Appellant.

No. 05-17066
D.C. No. CV-05-01605-SC
Northern District of California, San Francisco

**ORDER**

---

NGV GAMING, LTD, a Florida Partnership,

Plaintiff-Appellant,

v.

HARRAH'S OPERATING COMPANY, INC.;, a Delaware corporation,

Defendant - Appellee.

No. 05-17067
D.C. No. CV-05-03955-SC

Before: TROTT and N.R. SMITH, Circuit Judges, and SHADUR,* District Judge.

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* The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

Judges Trott and Shadur have voted to deny the petition for rehearing and Judge Smith has voted to grant. Judges Trott and Shadur recommend denying the petition for rehearing en banc and Judge Smith votes to grant.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: May 12, 2008 Decided: October 21, 2008)
Docket No. 06-5860-cv

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CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C., CATSKILL LITIGATION TRUST,

*Plaintiffs-Appellants,*

PAUL DEBARY, JOSEPH BERNSTEIN,
*Consolidated-Plaintiffs-Appellants,*

– v. –

PARK PLACE ENTERTAINMENT CORPORATION,
*Defendant-Appellee,*

HARRAH'S OPERATING COMPANY, INC.,

*Consolidated-Defendant-Appellee.*

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Before NEWMAN, WALKER, and
SOTOMAYOR, *Circuit Judges.*

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Plaintiffs-appellants Catskill Development, L.L.C. ("Catskill"), Mohawk Management, L.L.C. ("Mohawk"), and Monticello Raceway Development Company, L.L.C. ("Monticello"), and consolidated-

plaintiffs-appellants Paul DeBary and Joseph Bernstein (collectively, the "Catskill Group"), claim that defendant-appellee Park Place Entertainment Corporation ("Park Place") tortiously interfered with the Catskill Group's contractual and business relations with the non-party Mohawk Indian Tribe (the "Tribe"), when Park Place entered into an exclusive agreement with the Tribe to develop a casino. We affirm the district court's dismissal of the Catskill Group's tortious interference with contract claim on the ground that its contracts with the Tribe were void and otherwise unenforceable at the time of Park Place's alleged interference. We also affirm the district court's grant of summary judgment to Park Place on the Catskill Group's tortious interference with business relations claim on the ground that the Catskill Group has failed to establish a triable issue of fact that Park Place used wrongful means to interfere.

SANFORD I. WEISBURST, Quinn Emanuel Urquhart Oliver & Hedges, LLP (Andrew L. Frey, Mayer, Brown, Rowe, & Maw LLP, John P. Gallagher, Troutman Sanders LLP, *on the brief) for Plaintiffs-Appellants.*

GEORGE F. CARPINELLO, Boies, Schiller, & Flexner LLP (Martin Deptula, Teresa Monroe, Paul R. Verkuil, *on the brief) for Defendants-Appellees.*

SOTOMAYOR, *Circuit Judge*

These consolidated cases involve a dispute between a group of entities vying for the right to

develop a casino in the Catskills with the non-party Mohawk Indian Tribe ("the Tribe"). As explained further below, plaintiffs-appellants Catskill Development, L.L.C. ("Catskill"), Mohawk Management, L.L.C. ("Mohawk"), and Monticello Raceway Development Company, L.L.C. ("Monticello"), and consolidated-plaintiffs-appellants Paul DeBary and Joseph Bernstein (collectively, the "Catskill Group"),[1] claim that defendant-appellee Park Place Entertainment Corporation ("Park Place")[2] tortiously interfered with the Catskill Group's contractual and business relations with the Tribe, when Park Place entered into an exclusive agreement with the Tribe to develop a casino. We affirm the district court's dismissal of the Catskill Group's interference with contract claim on the ground that the Catskill Group's contracts with the Tribe were void and otherwise unenforceable at the time of the alleged interference. We affirm the district court's grant of summary judgment to Park Place on the Catskill Group's interference with business relations claim on the ground that the Catskill Group failed to establish a triable issue of fact that Park Place used wrongful means to

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[1] Although consolidated-plaintiffs-appellants DeBary and Bernstein are not members of the Catskill Group, their arguments on appeal are identical to those of the remaining plaintiffs-appellants. Thus, for ease of reference, we draw no distinction between the two groups of appellants in characterizing their arguments on appeal, and refer to them collectively in this context as the Catskill Group. Further, as explained below, the Catskill Group is joined by the Litigation Trust, which is also a plaintiff to this case.

[2] Park Place is now owned by consolidated-defendant-appellee Harrah's Operating Company, Inc.

interfere.[3]

## BACKGROUND

### A. Regulatory Framework

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–2721 (2006), which provides a detailed regulatory framework for Indian gaming.[4] Congress's express purpose in passing IGRA was, *inter alia*, to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments," while simultaneously "shield[ing tribes] from organized crime and other corrupting influences [and] ensur[ing] that . . . Indian tribe [s are] the primary beneficiar[ies] of . . . gaming operation[s]." *Id.* § 2702.

To conduct gaming, an Indian tribe must satisfy numerous prerequisites. As relevant to this case, the gaming must take place "on Indian lands . . . located within a State that permits such gaming." *Id.* § 27 10(b)(1)(A). IGRA generally prohibits gaming on lands that became Indian lands subsequent to IGRA's enactment in October 1988, unless the Governor of the relevant State "concurs" with a determination by the Secretary of the Interior that it "would be in the

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[3] We also affirm the district court's denial of the Catskill Group's motion for discovery sanctions because the district court had already granted relief for the alleged infractions by reopening discovery, which we find to be an appropriate remedy.

[4] IGRA divides Indian gaming into three categories: Class I includes traditional forms of gaming engaged in during tribal ceremonies; Class II is principally comprised of bingo games; and Class III includes all other forms of gaming, including casino "standards" such as roulette, blackjack, and slot machines. 25 U.S.C. § 2703(6)–(8).

best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." *Id.* § 2719(b)(1)(A).

Moreover, IGRA provides for federal oversight of contracts between tribes and non-tribal entities regarding the management of tribal gaming operations. *Id.* § § 2710(d)(9), 2711(g). Tribes may enter into contracts for the management of these gaming operations only with the approval of the National Indian Gaming Commission ("NIGC") Chairman. *Id.* § 2711(a)(1).[5] By regulation, unapproved management contracts are deemed "void." 25 C.F.R. § 533.7 (2008).

## B. Factual Background

In 1996, the Catskill Group entered into a series of contracts with the Tribe[6] for the purpose of building and operating a casino at a site adjacent to the Monticello Raceway. Three of those contracts are at issue here:

- A Land Purchase Agreement ("LPA") between the Tribe and Catskill, which, *inter alia,* provided for Catskill's transfer of 29 acres of land to the United States to be held in trust for the Tribe;
- A Management Agreement ("MA") between the Tribe and Mohawk, which, *inter alia,*

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[5] As discussed further below, a "management contract" is defined in the governing regulations as "any contract . . . or collateral agreement between an Indian tribe and a contractor . . . if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15.

[6] In the contracts the Tribe is referenced as the "St. Regis Mohawk Tribe." For simplicity, here the term "Tribe" is used throughout.

detailed the duties and responsibilities of Mohawk, and the fees for its management services; and

• A Development and Construction Agreement ("DCA") between the Tribe and Monticello, which, *inter alia,* provided for the construction and development of the casino and surrounding lands.

All of these agreements, in some manner, required the Tribe to use its best efforts and to cooperate with the Catskill Group in obtaining the requisite government approvals.[7] However, despite having spent millions of dollars, the Catskill Group still had not received all the necessary state and federal approvals by April 2000, and the NIGC had denied the Catskill Group's application several times. Although the United States Bureau of Indian Affairs (the "BIA") had agreed to take the land at issue in

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[7] In particular, the LPA provided that: "The [Tribe] shall use its reasonable best efforts to cause this Agreement together with any other documents necessary to effectuate the Transfer to be filed with [the BIA]," and "the [Tribe] shall . . . cooperate with [Catskill] and any of its Affiliates and use [its] reasonable best efforts in good faith to assist in obtaining the approval of the [BIA] of the Trust Conveyance and any other documents or transactions related thereto."

The DCA provided that its provisions would become effective only upon receipt of the required regulatory approvals and further required the parties "to cooperate and to use their commercially reasonable efforts to satisfy [this] condition at the earliest possible date."

Likewise, the MA provided that the agreement would be effective on the date when "the Chairman of the NIGC grants written approval of this Agreement. The parties agree to cooperate and to use their commercially reasonable efforts to satisfy the above condition at the earliest possible date."

trust for the Tribe, final approval was never provided because the New York Governor had not yet consented to the transfer, and the BIA had not made a final determination that the price ($10 million) to be paid by the Tribe for the land transfer did not exceed the land's fair market value.

Meanwhile, in mid-1999, Park Place sought an introduction to the Tribe through Ivan Kaufman, CEO of Presidents Resorts Casino, Inc. ("Presidents"), and Gary Melius, a real-estate developer, each of whom had pre-existing relationships with the Tribe. According to the Catskill Group, Park Place falsely represented to Kaufman that it would reward his efforts of favorably introducing Park Place to the Tribe by buying out his substantial investment in, and taking over the management of, the Tribe's struggling Akwesasne casino. Park Place also allegedly offered to Melius millions of dollars for an introduction to the Tribe, to be paid upon Park Place's acquisition of the Akwesasne management contract or upon Park Place's securement of an agreement with the Tribe regarding gaming operations in the Catskills/Monticello area. However, after Kaufman and Melius introduced Park Place to the Tribe, Park Place allegedly disavowed the agreements it had reached with those individuals.[8]

The Catskill Group alleges that during the ensuing negotiations between Park Place and the Tribe, Park Place misrepresented to the Tribe, *inter alia*, that the federal approval granted to Catskill to take land into trust for purposes of gaming was

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[8] Kaufman and Melius separately sued Park Place over the alleged breach of agreements and ultimately settled.

"portable," and that a casino project on another site would be approved within four months. Finally, and as described further below, Park Place also allegedly concocted, participated in, and acquiesced in a scheme with Kaufman to place a financial "squeeze" on the Tribe by slowing the Akwasasne casino's payroll, with the hope and intent that the Tribe would turn to Park Place for a financial bailout.

On April 14, 2000, the Tribe entered into a written agreement with Park Place, which set forth "certain understandings" reached between the parties: namely, that (1) Park Place would be the exclusive developer and manager of any Tribe casinos in New York (with certain exceptions not pertinent here); (2) Park Place and the Tribe would have a profit distribution of 70% to the Tribe and 30% to Park Place after the Tribe paid back Park Place for "advances" for the cost of development and construction; (3) Park Place would begin construction of a casino within 36 months unless otherwise agreed by the parties; (4) Park Place would pay the Tribe $3 million "for use by the Tribe in it's [sic] discretion," and which "shall be paid back to [Park Place] only in the event that the Tribe does not or is unable to enter into [certain] development, management and licensing agreements [with Park Place]; and (5) Park Place would indemnify the Tribe from litigation losses resulting from the Tribe's termination of its agreements with the Catskill Group.

Shortly after Park Place and the Tribe entered into this agreement, the Tribe and the Catskill Group ceased discussions with respect to the Monticello Raceway project.

## C. Procedural History

Catskill, Mohawk, and Monticello (i.e., the Catskill Group) commenced suit in November 2000 alleging, *inter alia,* that Park Place tortiously interfered with the Catskill Group's contractual relations with the Tribe ("Count I," or the "interference with contract claim"). In the alternative, the Catskill Group alleged that Park Place had tortiously interfered with its business relationships with the Tribe ("Count II," or the "interference with business relations claim").[9]

Upon Park Place's motion, the district court dismissed Count I on the grounds that none of the contracts at issue was enforceable in the absence of NIGC approval. *Catskill Dev., LLC v. Park Place Entm't Corp.,* 144 F. Supp. 2d 215, 232–34 (S.D.N.Y. 2001) *("Catskill I").* The district court, however, permitted Count II to proceed on the ground that there was a question of fact regarding whether the Catskill Group's losses stemmed directly from Park Place's actions. *Id.* at 238–39.

The Catskill Group moved for reconsideration, arguing, *inter alia,* that one of the contracts at issue—the LPA in particular—was enforceable without NIGC approval. The district court agreed and reinstated the interference with contract claim with respect to the LPA only. *Catskill Dev., LLC v. Park Place Entm't Corp.,* 154 F. Supp. 2d 696, 703–05 (S.D.N.Y. 2001) *("Catskill II").*

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[9] The Catskill Group also alleged unfair competition and antitrust claims against Park Place under New York state law, which the district court dismissed for failure to state a claim and are not at issue on appeal. *Catskill Dev., LLC v. Park Place Entm't Corp.,* 144 F. Supp. 2d 215, 239-41 (S.D.N.Y. 2001).

Park Place then moved the district court for reconsideration of that decision. While its reconsideration motion was pending, Park Place also moved for summary judgment on the remaining claims for tortious interference with business relations. The district court granted Park Place's motion for summary judgment, thus disposing of the entire case. *Catskill Dev., LLC v. Park Place Entm't Corp,* 217 F. Supp. 2d 423, 446 (S.D.N.Y. 2002) *("Catskill II").* With respect to Count I, the court held (as it had originally held in *Catskill I,* but for different reasons) that the LPA was void without NIGC approval. *Id.* at 433. With respect to Count II, the court dismissed the interference with business relations claim on the grounds that the Catskill Group (1) offered no evidence that Park Place used "wrongful means" to induce the Tribe to terminate its relationship with the Catskill Group, and (2) could not meet its burden of showing that Park Place caused the Catskill Group any harm in light of the many speculative regulatory contingencies. *Id.* at 435–46.

While the Catskill Group's appeal from that decision was pending, it moved in the district court pursuant to Federal Rule of Civil Procedure 60(b)(3) to vacate the judgment based on the Catskill Group's discovery of six audio tapes relevant to the interference with business relations claim that had not been produced during the discovery period. The district court held that Park Place's failure to disclose the tapes was the apparent product of "mistake" or misunderstanding, but nevertheless constituted "misconduct" for purposes of Rule 60(b) reopening. *Catskill Dev., LLC v. Park Place Entm't Corp.,* 286 F. Supp. 2d 309, 315 (S.D.N.Y. 2003) *("Catskill IV").* The

court granted the Catskill Group thirty days to conduct further discovery with respect to the matters raised in the tapes. *Id.* at 321.

Shortly thereafter, in January 2004, the members of the Catskill Group assigned "all of their right, title and interest in . . . any and all [its] claims . . . against Park Place" to a trust (the "Litigation Trust"). *See* Declaration of Trust of Catskill Litigation Trust, § 2.1.[10] The Litigation Trust was then added as a plaintiff to the case.

After further briefing following the close of the additional discovery period, the district court held that the Catskill Group still had failed to produce any evidence of wrongful means for purposes of the interference with business relations claim, and reaffirmed its grant of summary judgment in favor of Park Place. *Catskill Dev., LLC v. Park Place Entm't Corp.*, 345 F. Supp. 2d 360, 368 (S.D.N.Y. 2004) *("Catskill V")*. The Catskill Group, now joined by the Litigation Trust, reinstated its earlier appeal.

On appeal, a jurisdictional defect was revealed for the first time: two of the original plaintiffs, Catskill and Mohawk, were not completely diverse from Park Place. Absent complete diversity, federal jurisdiction did not exist under 28 U.S.C. § 1332. We thus remanded the case to the district court to address, *inter alia:* (1) whether Park Place and Monticello were completely diverse for jurisdictional purposes at the time the action was commenced; and (2) whether dismissal of Catskill (the signatory to the LPA) and Mohawk (the signatory to the MA) from the case would result in undue prejudice to Monticello

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[10] Available at http://www.sec.gov/Archives/edgar/data/1278539/000092189504000172/ex32tos1_02032004.htm.

(the signatory of the DCA) or Park Place.[11] *Catskill Litig. Trust v. Park Place Entm't Corp.*, 169 Fed. App'x 658, 660–61 (2d Cir. 2006).

Upon the parties' stipulation, the district court signed an order, pursuant to Federal Rule of Civil Procedure 21, dismissing from the original action all but Monticello and Park Place, which the district court determined were completely diverse at the time the original complaint was filed.[12] Subsequently, the trustees of the Litigation Trust filed a new complaint against Park Place, and the district court consolidated the new and original actions under Federal Rule of Civil Procedure 42(a). *Debary v. Harrah's Operating Co.*, 465 F. Supp. 2d 250, 260 (S.D.N.Y. 2006) *("Catskill VI")*.

After six district court opinions and two prior appeals, the case now returns to us for a third time.

## DISCUSSION

### I. JURISDICTION

Although the parties do not contest our

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[11] We also remanded for the district court to determine whether Monticello was a third-party beneficiary of the LPA and whether New York law permits a third-party beneficiary of a contract to recover damages for tortious interference with that contract, but those issues are not pertinent to our disposition of the case.

[12] Pursuant to the Rule 21 factors, the district court found "that Catskill and Mohawk were dispensable parties given that complete relief could be accorded between the remaining parties, and because any judgment against Monticello in this action would have preclusive effect against Catskill and Mohawk." *Debary v. Harrah's Operating Co.*, 465 F. Supp. 2d 250, 260 (S.D.N.Y. 2006). Additionally, the stipulation among the parties provided sufficient evidence that no party to the litigation would "suffer prejudice by virtue of the dismissal." *Id.* (citing *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989)).

jurisdiction, we are obliged to ascertain it independently. *See, e.g., Joseph v. Leavitt,* 465 F.3d 87, 89 (2d Cir. 2006) ("Although neither party has suggested that we lack appellate jurisdiction, we have an independent obligation to consider the presence or absence of subject matter jurisdiction *sua sponte.*"). We conclude that we have jurisdiction over both the original and consolidated action. First, with respect to the original action that we previously remanded for a jurisdictional finding, we see no factual error in the district court's determination that the remaining parties—Monticello and Park Place—were completely diverse at the time that action was commenced.

Second, with respect to the subsequently commenced action by the trustees, we are satisfied upon our review of the trust agreement and our questioning of the parties at oral argument that diversity jurisdiction exists over that action as well. For purposes of diversity jurisdiction, the citizenship of the fiduciary—not the beneficiary—generally controls. *See O'Brien v. AVCO Corp.,* 425 F.2d 1030, 1032 (2d Cir. 1969) (citing *Dodge v. Tulleys,* 144 U.S. 451 (1892)). An exception exists where there is evidence of collusion for the purpose of obtaining federal jurisdiction. *See* 28 U.S.C. § 1359; *see also Navarro Sav. Ass'n v. Lee,* 446 U.S. 458, 465–66 (1980) (holding that trustees who were "real parties in interest" could invoke diversity jurisdiction on the basis of their own citizenships, in the absence of allegations of sham or collusion to manufacture diversity jurisdiction).

Specifically, under the so-called "anti-collusion" statute, 28 U.S.C. § 1359, "[a] district court shall not have jurisdiction of a civil action in which any party,

by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." We explained in *Airlines Reporting Corp. v. S & N Travel, Inc.* that:

> We give careful scrutiny to assignments which might operate to manufacture diversity jurisdiction, the reasons for which we have made abundantly clear: such devices, unless controlled, can provide a simple means of expanding federal diversity jurisdiction far beyond [its] purpose. The cautious eye with which we view such assignments ensures that parties do not inappropriately channel ordinary tort and contract litigation, essentially disputes of a local nature, into the federal courts. Accordingly, we construe section 1359 broadly to bar any agreement whose "primary aim" is to concoct federal diversity jurisdiction.

58 F.3d 857, 862 (2d Cir. 1995) (citations and quotation marks omitted); *see also Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 825–26 (1969) (explaining that the purpose of the anti-collusion statute was "to prevent the manufacture of Federal jurisdiction by the device of assignment") (internal quotation marks omitted). In assessing whether an assignment is improper or collusive, several factors may be relevant, including but not limited to: "the assignee's lack of a previous connection with the claim assigned; the remittance by the assignee to the assignor of any recovery; whether the assignor actually controls the conduct of the litigation; the timing of the assignment; the lack of any meaningful

consideration for the assignment; and the underlying purpose of the assignment." *Airlines Reporting Corp.*, 58 F.3d at 863 (citations omitted). No single factor is dispositive. *Id.*

Here, we are satisfied that the Litigation Trust was not created for the improper purpose of manufacturing federal jurisdiction. To begin with, we are assured by appellants' counsel that the Trust was created *prior* to counsel's discovery of the jurisdictional defect. Moreover, a SEC filing supports the appellants' assurances to us that the Litigation Trust was created for a legitimate business purpose; to wit, as a "condition to closing" a consolidation deal among Catskill, Mohawk and Monticello. Finally, the express terms of the Trust agreement place full responsibilities and powers over the litigation in the Trustees, and we have no reason to believe that these terms of the agreement are not being honored. We are thus satisfied that jurisdiction exists over the consolidated cases before us. *See Navarro*, 446 U. S. at 463–65.

## II. INTERFERENCE WITH CONTRACT CLAIM

To state a contract-interference claim under New York law, a plaintiff must demonstrate the existence of a valid contract, the defendant's knowledge of the contract's existence, that the defendant intentionally procured a contract breach, and the resulting damages to the plaintiff. E.g., *Int'l Minerals & Res., S.A. v. Pappas*, 96 F.3d 586, 595 (2d Cir. 1996); *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y. 2d 413, 424, 646 N.Y.S. 2d 76, 82, 668 N.E.2d 1370, 1375 (1996). Only the first element—the existence of a contract—is at issue here. The district court held that the Catskill Group could not satisfy

this element as a matter of law because its contracts with the Tribe were void in the absence of prior NIGC approval under 25 C.F.R. § 533.7 (providing that "[m]anagement contracts . . . that have not been approved by the Secretary of the Interior or the Chairman . . . are void").

On appeal, the Catskill Group raises three principal challenges to the district court's determination in this regard. First, it claims that the federal voiding provisions do not apply to any of the contracts at issue—the MA (Management Agreement), the LPA (Land Purchase Agreement), and the DCA (Development and Construction Agreement)—because these contracts concern lands that are not yet "Indian lands." Second, the Catskill Group argues that the voiding provisions do not invalidate the Tribe's precursory obligations to act in good faith in seeking required agency approvals. Third, it argues that even if the voiding provision of 25 C.F.R. § 533.7 applies to the MA, it does not apply to the LPA or DCA because those agreements do not contain gaming management provisions.[13] We address, and reject, each of these assertions in turn below.

### A. "Indian Lands"

IGRA defines "Indian lands," in relevant part, as "lands within the limits of any Indian Reservation" or "lands title to which *is* . . . held in trust by the United States for the benefit of any Indian tribe." 25

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[13] The Catskill Group also alleges that New York law allows a contract interference claim even where the underlying contract is void under federal law. Because New York law plainly predicates contract interference on the existence of a valid contract, this argument is frivolous.

U.S.C. § 2703(4) (emphasis added).[14] The Catskill Group argues that while the LPA contemplated a land transfer from Catskill to the United States in trust for the Tribe, the land was owned by Catskill at all relevant times, and thus was not land that "is" Indian land subject to the NIGC's voiding provision. The Catskill Group further asserts that this interpretation does not result in a regulatory gap because any proposed gaming on lands not yet held in trust would be regulated by state law, and nothing in IGRA would require states to allow Indian gaming on the site. We disagree with this interpretation of IGRA.

To begin with, the NIGC's authority to approve management contracts does not appear to hinge on whether the contract relates to Indian lands. Neither the governing statutes relating to gaming management contracts, 25 U.S.C. §§ 2710(d)(9), 2711, nor the NIGC's implementing regulations, 25 C.F.R. §§ 533.1, 533.7,[15] expressly require that a gaming

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[14] Likewise, 25 U.S.C. § 81 defines "Indian lands" to include "lands the title to which *is* held by the United States in trust for any Indian tribe." (emphasis added)

[15] 25 C.F.R. § 533.1 provides:

> Subject to the Chairman's approval, an Indian tribe may enter into a management contract for the operation of a class II or class III gaming activity.
>
> (a) Such contract shall become effective upon approval by the Chairman.
>
> (b) Contract approval shall be evidenced by a Commission document dated and signed by the Chairman. No other means of approval shall be valid.
>
> (c) Contracts approved by the Secretary remain effective until approved or disapproved by the Chairman.

25 C.F.R. § 533.7 provides:

contract relate to Indian lands for it to be subject to NIGC approval. Indeed, the absence of any mention of "Indian lands" in § 2710(d)(9) or § 2711 stands in contrast to many of the surrounding statutory provisions, which are *expressly* limited in some way to Indian lands. *See, e.g.*, 25 U.S.C. §§ 2710(d)(1), (2), (3), (5), (7), (8) (relating to class III gaming "on Indian lands"); *id.* §§ 2710(b) (1), (2), (4) (relating to class II gaming "on Indian lands").

Even if we were to read an "Indian land" requirement into the governing statutes and regulations at issue, we would nevertheless reject the Catskill Group's proposed application of any such requirement to the circumstances of this case. The Dictionary Act, 1 U.S.C. § 1, instructs that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words used in the present tense include the future as well as the present." Thus, when construing the definition of "Indian lands" in 25 U.S.C. § 2703(4), the Dictionary Act instructs us to read the words "which *is* held in trust " to also include land that *will be* held in trust. *Cf. Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 784 (9th Cir. 2008) (Smith, J., dissenting).[16] The Catskill Group's narrow

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Management contracts and changes in persons with a financial interest in or management responsibility for a management contract, that have not been approved by the Secretary of the Interior or the Chairman in accordance with the requirements of this part, are void.

[16] In *Guidiville*, the Ninth Circuit addressed the meaning of "is" in the context of 25 U.S.C. § 81's definition of Indian lands. 531 F.3d at 774. The majority opinion concluded, in that context, that "is" should be given its literal meaning and that the Dictionary Act did not apply because the "context" in which the term was used appeared to indicate that Congress did not

interpretation—which would give the NIGC review authority over only contracts relating to already existing Indian land—would thwart Congress's intent to have the NIGC oversee contracts for the purpose of promoting the best interests of Indian tribes. *See* 25 U.S.C. §§ 2701, 2702. There is no dispute here that the purpose of all of the contracts at issue was to build and operate a casino on what was intended to become Indian land. Indeed, in the absence of acquisition of Indian land, the casino project was a non-starter both by law, *see* 25 U.S.C. § 2701(5), and contract.

Moreover, the Catskill Group's argument that states would fill the IGRA regulatory gap falls short. Congress intended that there would be both federal and state review of gaming contracts; however, the two serve entirely separate functions. Federal approval is designed to ensure that the contracts tribes enter into are fair and reasonable. State compacts, however, are designed to protect the state's taxing authority and police powers over gaming and are not designed to protect tribal interests.

In reaching our conclusion that the NIGC's review and approval authority extends to the

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intend "is" to mean "will be." *Id.* at 774–79. *Guidiville* is distinguishable insofar as it was interpreting § 81, which expressly pertained to encumbrances of "Indian land," rather than to management contracts. *Id.* at 769. Moreover, in *Guidiville*, no land had yet been acquired or even identified for gaming purposes by either of the contracting parties. *Id.* at 770–71. To the extent these differences are not material to the Ninth Circuit's majority opinion, we nevertheless agree with Judge Smith's dissenting view that transactions involving land that "will be" held in trust trigger the agency's review authority, especially where specific land to be taken into trust is identified in the operative agreements. *See id.* at 783–87.

contracts at issue, we have considered the 2000 opinion letter by the deputy general counsel for the NIGC issued in an unrelated case—but relied upon by the Catskill Group here—that asserts that land intended to be placed into trust, but not yet held in trust by the United Sates, is not Indian land. Letter from Penny J. Coleman, Deputy General Counsel, NIGC to Chief, Region V (July 30, 2001) ("Coleman Opinion Letter").[17] Because this position was set forth in an opinion letter and has not been promulgated by an NIGC regulation, this Court owes it only the limited deference set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that agency interpretations in opinion letters "lack the force of law" and are entitled only to *Skidmore* deference). As such, the interpretation reflected in the Coleman Opinion Letter is entitled to deference only to the extent that it has the power to persuade us. *Id.* We conclude this letter lacks persuasive power.

The Opinion Letter is based on nothing more than a literal reliance on the statutory language's use of the present tense, which, for the reasons we have already explained, is contrary to the Dictionary Act and would be inconsistent with congressional design. Moreover, we have reason to doubt that the deputy counsel expected her opinion to be binding in future, unrelated cases. Her conclusions were hedged as

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[17] The Opinion Letter states: "While we understand that the Tribe seeks to have these lands placed into trust, these lands are not presently held in trust by the United States for the benefit of the Tribe. Therefore, the lands . . . are not trust lands [for purposes of 25 U. S.C. § 2703(4)(b)]," and are thus not Indian lands. Coleman Opinion Letter at 3.

"preliminary" and were expressly limited to the facts before her. *See* Coleman Opinion Letter at 1. Further, we believe it is telling that in the cases currently before us, the NIGC actively reviewed the at-issue contracts, and, as discussed further below, rejected them. Thus, to the extent the Opinion Letter reflected NIGC policy regarding "Indian lands," this policy appears to be inoperative based on the NIGC's actions in these cases. Under these circumstances, we decline to defer to the Opinion Letter.

**B. "Operative" Versus "Precursory" Obligations**

We also reject the Catskill Group's assertion that the federal voiding provisions apply at most to the "operative" provisions of the contracts at issue, but not the "precursory" obligation of the Tribe to use reasonable best efforts in obtaining the requisite government approvals. The same argument was rejected by the Ninth Circuit in *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 788–89 (9th Cir. 1986). In *A.K.*, a bingo contractor entered into an agreement to construct a bingo facility and operate bingo games on the Indian tribe's reservation. *Id.* at 786. The agreement was never signed or approved by the BIA, which, prior to the establishment of the NIGC, was the agency responsible for overseeing gaming contracts under 25 U.S.C. § 81. *Id.* Three days after the agreement was signed, the contractor was notified that the Indian tribe would not recognize the agreement. *Id.* The contractor filed a suit in district court seeking a declaration that the agreement was valid, binding, and enforceable, but the district court dismissed the contractor's complaint. *Id.* On appeal, the contractor argued, *inter alia*, that the tribe was subject to both

an express and implied duty of good faith and fair dealing to seek the BIA's approval. *Id.* at 788. The contractor further argued that the tribe should not be allowed to escape contractual liability by its own failure to act. The Ninth Circuit rejected these arguments, explaining:

> Whatever the persuasive force of these arguments, it is doubtful that general contract principles apply to an agreement subject to 25 U.S.C. § 81 (1982). Section 81 explicitly provides that a contract is "null and void" without written approval from the BIA. Therefore it is logical to conclude that an agreement without BIA approval must be null and void in its entirety. No part of it may be enforced or relied upon unless and until BIA approval is given. BIA approval is an absolute prerequisite to the enforceability of the contract. To give piecemeal effect to a contract as urged by [appellant], would hobble the statute. The plain words of section 81 simply render this contract void in the absence of BIA approval. Since it is void, it cannot be relied upon to give rise to *any* obligation by the [tribe], including an obligation of good faith and fair dealing. Accordingly, we find that general contract principles do not impose a duty on the [tribe] to seek BIA approval of the Agreement.

*Id.* at 789 (footnote omitted).

We are persuaded by both the reasoning and holding of *A.K.* Like § 81, the federal review provisions at issue in our case are broadly worded,

are designed to protect the best interests of Indian tribes, and do not draw the distinction between operational and precursory obligations urged upon us by the Catskill Group.

Moreover, we are unmoved by the Catskill Group's broader policy argument that the enforcement of good faith obligations is, on balance, in the best interest of Indian tribes. Specifically, the Catskill Group argues that it "hardly serves tribal interests to have 'freedom' to walk away from a bargained-for obligation to seek approval after its contracting partner has spent much time and money doing the arduous legwork involved in the approval process; rather, this will only imperil a tribe's ability in the first instance to find worthy partners prepared to contract on favorable terms."

While in theory it is *possible* that investors may be less inclined to deal with Indians who are free to disregard obligations to perform in good faith, we are aware of no empirical evidence that supports this concern. Indeed, to allow tribes the ability to walk away from a deal prior to agency approval seems at least equally likely to promote the ends of IRGA: an investor who fears losing a tribe's partnership to a competitor can protect itself by offering a more attractive deal to a tribe, which is in that tribes's best interest.

Finally, the Catskill Group's reliance on *Vanadium Corp. of Am. v. Fidelity & Deposit Co.*, 159 F.2d 105 (2d Cir. 1947), is unavailing. In *Vanadium*, two non-Indian parties contracted for a variety of mining lease assignments. *Id.* at 106. Because the land underlying the leases belonged to the Navajo tribe of Indians, a federal statute was triggered, requiring pre-approval by the Secretary of the

Interior for any transfer or assignment of a mining lease on Indian land. *Id.* (citing 25 U.S.C. § 396a). Additionally, the parties separately contracted for a provision providing that "in the event the assignments were not approved . . . the agreement would be deemed cancelled." *Id.* Thereafter, the plaintiff determined that the assignments were unfavorable, refused to cooperate in seeking federal approval (which consequently was denied), and sought return of his deposit, arguing that the contracts were "dead" without approval. *Id.* at 107-08. This Court disagreed, explaining that "[i]t was surely not the intent of the parties when they made an apparently binding assignment that the plaintiff should have the power to invalidate the assignment by not filing it for approval. On the contrary, it must have been assumed that plaintiff would reasonably file it and in good faith seek its approval." *Id.* at 108.

While the above-quoted language from *Vanadium* offers some support for the Catskill Group's theory that agreements to act in good faith are enforceable even prior to receipt of government approval, *Vanadium* did not establish a *per se* rule to that effect. Moreover, *Vanadium* is distinguishable from this case in two crucial respects. First and foremost, in *Vanadium* the plaintiff's argument that the agreement was void absent federal approval had a contractual genesis; neither the statute nor regulation at issue, 25 U.S.C. § 396a and 25 C.F.R. § 186.26, contained a voiding provision. Accordingly, this Court applied the general contract principle of good faith to decide the case. *See id.* at 108 (noting plaintiff's breach of a "condition precedent"—good faith—to the contract and citing to the Restatement (Second) of Contracts § 395). Here, however, we

confront a voiding provision entrenched within a federal regulation, 25 C.F.R. § 533.7, suggesting a federal intent that, lacking the Secretary's approval, contracts subject to IGRA are void *ab initio*, notwithstanding general contract principles to the contrary, like good faith. Second, unlike in this case, the parties in Vanadium were not Indian, thus the underlying policy of promoting Indian interests was not upset by the invocation of general contract principles. Indeed, such policy concerns did not appear to have been given any consideration by the panel in that case.[18]

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[18] The Catskill Group also relies on *Thorstenson v. Norton*, 440 F.3d 1059, 1060 (8th Cir. 2006), where an Indian and his non-Indian wife contracted to sell various land tracts to two non-Indian purchasers (Thorstenson's predecessors-in-interest), including land held in trust by the United States. Under 25 C.F.R. § 152.17, trust land requires authorization from the Secretary of the Interior before it can be sold, and a separate contract stipulated that if such authorization was not acquired the sellers would transfer into escrow money the buyers had already conveyed as a down payment. *Id.* at 1060–61. The sellers ultimately refused to transfer the trust land and never placed the buyers' (now Thorstenson's) deposit into escrow. *Id.* at 1061. Thorstenson successfully sued for the return of the deposit money, as the Eighth Circuit concluded that "[w]hether or not the BIA had yet approved of the initial contracts is neither here nor there as to Thorstenson's recovery for money paid, prematurely, for the trust land at issue . . . ." *Id.* at 1064. The Catskill Group uses *Thorstenson* to buttress its "precursory obligation" theory that even if the agreements at issue are generally void without NIGC approval, provisions that required the Tribe to act in good faith, like the escrow agreement in *Thorstenson*, are enforceable. But *Thorstenson* does not analogize well to the situation before us and is thus unpersuasive. The court in *Thorstenson* emphasized the "separate nature of the escrow agreement" and that the claim for the return of the deposit "did not involve title to the trust

Accordingly, we reject the Catskill Group's contention that the purported good-faith obligations in the contracts somehow bound the Tribe to use reasonable best efforts in obtaining the requisite government approvals.[19]

## C. Management and Collateral Agreements

Having rejected the Catskill Group's threshold "Indian land" and "precursory obligation" arguments, we now turn to the question of whether the contracts at issue were "management contracts" void under 25 C.F.R. § 533.7, or otherwise unenforceable. *See Scutti*

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land at all—only money." *Id.* at 1064. At most, *Thorstenson* stands for the proposition that a buyer has legal recourse where a Native American seller breaches an escrow agreement to return the buyer's deposit if a sale of trust land is not consummated. *See id.* ("Nothing should hinder an Indian's right to enter into a binding escrow agreement that states 'I'm going to comply with the law.'"). But here, the Catskill Group seeks prospective damages, which are intimately tied to a variety of casino operating contracts that failed to receive federal approval. Without such approval those contracts are void, just like the underlying contract for the sale of land in *Thorstenson*, which the Eighth Circuit—separate from its analysis of the escrow agreement—notably deemed unenforceable absent BIA approval. *See id.* 1064–65 n.4 (finding that Thorstenson "has no tenancy rights at this time and it was unreasonable for him to believe otherwise" because "that tenancy is subject to BIA approval, which has not yet been given").

[19] We leave open the issue of whether other types of contractual obligations in management contracts (e.g., arbitration clauses) are severable and enforceable prior to receiving government approval of the contract as a whole. For purposes of this case, we hold only that the obligation to act in good faith, and general contract principles that favor such a policy in other contexts, yield to the regulatory dictate that unapproved contracts are void. *See* 25 C.F.R. § 533.7.

*Enters., LLC v. Park Place Entm't Corp.*, 322 F.3d 211, 215 (2d Cir. 2003) ("[I]n the absence of an enforceable contract, it was appropriate to dismiss Scutti's cause of action for tortious interference with contractual relations.").

As noted above, § 533.7 provides that: "*Management contracts* . . . that have not been approved by the Secretary of the Interior or the Chairman in accordance with the requirements of this part, are void." 25 C.F.R. § 533.7 (emphasis added). In turn, the regulations define a "management contract" as "any contract, subcontract, or *collateral agreement* between an Indian tribe and a contractor . . . *if such contract or agreement provides for the management of all or part of a gaming operation.*" *Id.* § 502.15 (emphasis added). A "collateral agreement" includes "any contract . . . that is related, either directly or indirectly, to a management contract." *Id.* § 502.5.

As an initial matter, the MA (Management Agreement) entered into between Mohawk and the Tribe, which provided for the management of the putative casino, is clearly subject to section 533.7's voiding provision. The more difficult question is whether the remaining two contracts at issue—the LPA (Land Purchase Agreement) entered into between Catskill and the Tribe, and the DCA (Development and Construction Agreement), entered into between Monticello and the Tribe—are also subject to the voiding provision or are otherwise unenforceable.

It is undisputed that both the DCA and LPA are "collateral agreements" to the MA insofar as they are "related" to that contract. *See id.* § 502.5. But a collateral agreement is subject to agency approval

under *Id.* § 533.7 only if it "provides for the management of all or part of a gaming operation." *Id.* § 502.15; *see also Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659, 665–67 (W.D. La. 2005).[20] Whether an agreement meets this requirement depends on the circumstances and is not always self-evident. *See First Am. Kickapoo Operations L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1172–75 (10th Cir. 2005) (holding that operating lease constituted a management agreement); *Machal*, 387 F. Supp. 2d at 667 (holding that a "settlement agreement," which expressly purported not to be a "gaming agreement," was in fact a management contract insofar as it allocated management authority in regards to a casino); *see also* 57 Fed. Reg. 12,382–01, 12,388 (April 9, 1992) (NIGC will review for approval any agreement, however labeled, the subject matter of which is the "management of a gaming operation").

In this case, Park Place argues that the DCA and LPA were management contracts insofar as they contained hidden management fees. In particular, Park Place claims that the DCA's 5% development fee and the LPA's $10 million purchase price were intended as back-door management compensation. Further, with respect to the DCA only, Park Place points out that Monticello was to be repaid for the

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[20] To the extent that the district court interpreted the regulations as requiring NIGC approval of *all* collateral contracts, it erred. However, we affirm the district court's decision for the reasons explained in the text. *See ACEquip Ltd. v. Am. Eng'g Corp.*, 315 F.3d 151, 155 (2d Cir. 2003) ("Our court may, of course, affirm the district court's judgment on any ground appearing in the record, even if the ground is different from the one relied on by the district court.").

construction of the proposed casino from the proceeds derived from the operation of the casino. *See Machal*, 387 F. Supp. 2d at 667–68 (holding that one of the agreements at issue was a management contract, in part, because it required the tribe to repay from gaming revenues the loans it received from plaintiff for construction of the casino and other costs); *see also In re SRC Holding Corp.*, 352 B.R. 103, 174–78 (Bankr. D. Minn. 2006) (pledge agreement that purported to assign to lender the manager's rights to management fees constituted a management contract subject to NIGC approval), *rev'd in part on other grounds*, 364 B.R. 1 (D. Minn. 2007).

We need not independently determine whether the DCA or LPA are collateral agreements subject to agency approval because: (1) the agency appears already to have made that determination, *see United States ex. rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 425 (8th Cir. 2002) (deferring to NIGC's determination that agreement was a management contract subject to approval); (2) at all relevant times the contracting parties treated these agreements as being subject to agency approval; (3) and the terms of the contracts themselves contemplated agency approval, *see Scutti*, 322 F.3d at 215 (agreeing with district court finding that "under its unambiguous terms, Scutti's proposed contract with the Mohawks was not effective or binding—and therefore not enforceable—until approved by the NIGC").

Specifically, both the DCA and the LPA were submitted to the NIGC for review. With respect to the DCA, the NIGC's Director of Contracts stated in an April 19, 2000 letter denying agency approval that it had "determined that the [MA] and DCA together are management contracts and are subject to NIGC

approval." Moreover, with respect to the LPA, the NIGC Director of Contracts by letter twice requested an explanation for the Tribe's proposed purchase price for the land, and expressed the concern that the purchase price was a hidden management compensation. Although the Catskill Group responded that the purchase price was a fair one, at no time did it challenge, at the agency level, the NIGC's determination that the LPA was subject to its approval. The same is true with respect to the terms of the DCA. Indeed, in Master Agreements entered into between the Tribe and the Catskill Group in 2000, the parties expressly recited that the agreements "for the purchase of the property, [i.e., the LPA] and the development, [and] construction . . . of the gaming facility" [i.e., the DCA] had been submitted to the NIGC and the BIA "for review *and* approval." (emphasis added). Moreover, by their terms both the LPA and DCA contemplated prior agency approval by the BIA. In particular, the DCA's effective date was contingent upon receipt of BIA approval, while the LPA's land deal was contingent upon the BIA's approval of the transfer of land into trust for the Tribe.

Under these circumstances, we conclude that all of the contracts at issue were void under § 533.7 absent the requisite agency approval(s). Accordingly, we affirm the district court's dismissal of the Catskill Group's interference with contract claim.

## III. INTERFERENCE WITH BUSINESS RELATIONS CLAIM

In the absence of enforceable contracts, the Catskill Group hopes to prevail on a claim for tortious interference with business relations. To state a claim

for this tort under New York law, four conditions must be met: (1) the plaintiff had business relations with a third party; (2) the defendant interfered with those business relations; (3) the defendant acted for a wrongful purpose or used dishonest, unfair, or improper means; and (4) the defendant's acts injured the relationship. *See Lombard v. Booz-Allen & Hamilton, Inc.*, 280 F.3d 209, 214 (2d Cir. 2002) (describing the tort by an alternative name, "tortious interference with prospective economic advantage"); *Goldhirsh Group, Inc. v. Alpert* 107 F.3d 105, 108–09 (2d Cir. 1997) (stating the elements as constitutive of "tortious interference with . . . business relations"). Only the third and fourth elements are at issue here, and we do not reach the latter because we conclude below that the Catskill Group has failed to present a triable issue of fact on element three, wrongful means.

The wrongful means requirement makes alleging and proving a tortious interference claim with business relations "more demanding" than proving a tortious interference with contract claim. *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191, 428 N.Y.S.2d 628, 632, 406 N.E.2d 445, 449–50 (1980) (describing the interference with business relations tort by an alternative name, "interference with prospective contractual relations" and describing element three as "wrongful means"). The standard is more demanding because a plaintiff's mere interest or expectation in establishing a contractual relationship must be balanced against the "competing interest of the interferer," *id.*, 428 N.Y.S.2d at 632, 406 N.E.2d at 449, as well as the broader policy of fostering healthy competition, *NBT Bancorp Inc. v.*

*Fleet/Norstar Fin. Group, Inc.*, 87 N.Y.2d 614, 623, 641 N.Y.S.2d 581, 586, 664 N.E.2d 492, 497 (1996). While a defendant's commission of a "crime or an independent tort" clearly constitutes wrongful means, such acts are not essential to find wrongful means. *See Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 189, 785 N.Y.S.2d 359, 361–62, 818 N.E.2d 1100, 1102–03 (2004); *see also Hannex Corp. v. GMI, Inc.*, 140 F.3d 194, 206 (2d Cir. 1998) (holding that participating in a knowing breach of fiduciary duty can constitute wrongful means).

Here, the Catskill Group contends that the record contains ample evidence to permit reasonable jurors to conclude that Park Place engaged in wrongful means. The Catskill Group's claim centers around the following three themes:

- Park Place defrauded two individuals—Gary Melius and Ivan Kaufman—to obtain favorable introductions to the Tribe, and then defrauded the Tribe by falsely representing to the Tribe that no delay in the project would be occasioned by partnering with Park Place;

- Park Place committed the tort of knowing participation in another's breach of fiduciary duty, specifically Kaufman's breach of his fiduciary duty to the Tribe, by intentionally slowing payroll at the Akwesasne casino. Park Place then "ratified" or knowingly accepted the benefits of that breach by positioning itself as the Tribe's financial savior; and

- Park Place exerted economic pressure on the Tribe by making Park Place's $3 million loan to the Tribe contingent upon the Tribe's abandonment of the Catskill Group.

We reject each of these theories.

## A. Park Place's Alleged Fraud

### 1. Alleged Fraud Against Melius and Kaufman

There is no dispute that Park Place gained initial access to the Tribe through Melius and Kaufman, each of whom had pre-existing relationships with the Tribe. The Catskill Group contends, however, that Park Place used fraudulent means to induce Melius and Kaufman to introduce Park Place to the Tribe, thereby committing the requisite wrongful act for an interference claim.

The district court—without determining whether Park Place had engaged in the fraud alleged—held that Park Place's action could not form the basis of an interference with business relations claim because the alleged conduct was not directly injurious to either the Catskill Group or the Tribe. *Catskill III,* 217 F. Supp. 2d at 439–40. The district court's holding is entirely consistent with what we have previously recognized in other contexts: a plaintiff must "demonstrate *both* wrongful means *and* that the wrongful acts were the proximate cause" of the alleged injury. *State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada,* 374 F.3d 158, 171–72 (2d Cir. 2004) (citing *Pacheco v. United Med. Assocs., P. C.,* 305 A.D.2d 711, 712, 759 N.Y.S.2d 556 (3d Dep't 2003)); *Jabbour v. Albany Med. Ctr.,* 237 A.D.2d 787, 790, 654 N.Y.S.2d 862 (3d Dep't 1997). Because any fraud by Park Place against Kaufman and Melius did not directly cause the Catskill Group (or the Tribe) any harm, this theory of liability fails as a matter of law. *See Excel Group, Inc. v. Permis Constr. Corp.,* 254 A.D.2d 451, 452, 678 N.Y.S.2d 778,

778 (2d Dep't 1998) (defendant's improper use of a report in violation of its agreement with a third-party did not make the defendant's interference with plaintiff's business relationship "wrongful").

Two cases upon which the Catskill Group relies—*Sommer v. Kaufman*, 59 A.D.2d 843, 399 N.Y.S.2d 7 (1st Dep't 1977), and *Pagliaccio v. Holborn Corp.*, 289 A.D.2d 85, 734 N.Y.S.2d 148 (1st Dep't 2001)—are inapposite. In both of those cases the defendant's wrongful conduct against third-parties bore a direct nexus to the relationship with which the defendant interfered. *See Sommer,* 59 A.D.2d at 843, 399 N.Y.S.2d at 7–8 (defendants directly injured plaintiff by bribing public official to deny plaintiff a building permit for the subject project); *Pagliaccio,* 289 A.D.2d at 85, 734 N.Y.S.2d at 149 (defendants alleged to have directly injured plaintiff by threatening plaintiff's employer with harm if plaintiff's employment was not terminated). Here, by contrast, the alleged fraud against Melius and Kaufman—which netted an introduction to the Tribe—had at most a tenuous relation to the harm alleged.

**2. Alleged Fraud Against the Tribe**

The Catskill Group's claim that Park Place also committed fraud against the Tribe when, in the final stages of negotiations, Park Place announced that it could "switch" the limited approval the Catskill Group had obtained to Park Place's site "without any significant loss of time." The district court held that Park Place's assurance (which turned out to be false) was not actionable because it was mere "puffery," and the Tribal Chiefs testified that they "did not rely on [Park Place's] corporate

braggadoccio." *Catskill III,* 217 F. Supp. 2d at 437.

Although the Catskill Group acknowledges the general principle that statements of opinion generally cannot constitute fraud, *see, e.g., George Backer Mgmt. Corp. v. Acme Quilting Co.,* 46 N.Y.2d 211, 220, 413 N.Y.S.2d 135, 140, 385 N.E.2d 1062, 1067 (1978), the Catskill Group relies on the narrow exception to that rule: namely, that opinions *"may* constitute actionable fraud where a present intent to deceive exists." *Magnaleasing, Inc. v. Staten Island Mall,* 563 F.2d 567, 569 (2d Cir. 1977) (emphasis added); *see also Harsco Corp. v. Segui,* 91 F.3d 337, 346 n.7 (2d Cir. 1996) ("[F]raud liability may attach when a person state[s] that something was to be done when he kn[ows] all the time it was not to be done and that his representations were false." (internal quotation marks omitted)). In particular, the Catskill Group maintains that Park Place made the assurance of timeliness to the Tribe knowing full well that its assurance was false.

The fatal shortcoming of the Catskill Group's theory, however, is the absence of any facts to support it. Clive Cummis—Park Place's former vice-president, who made the alleged assurance—testified that his statement was based upon his then-knowledge of the federal approval process, which was based on advice of counsel. Moreover, the Tribal Chiefs testified in their depositions that they did not rely on Park Place's alleged assurance, and that testimony stands uncontroverted. Absent any evidence that Cummins's statement was motivated by an attempt to deceive, that it did in fact deceive the Tribe, or that Park Place had any knowledge superior to the Tribe's with respect to the anticipated timing of events beyond either party's control, the district court properly

rejected the Catskill Group's allegation of wrongful means against the Tribe.

### B. Participation in Kaufman's Breach of Fiduciary Duty to the Tribe

The Catskill Group further contends that Park Place used wrongful means insofar as it knowingly participated in a breach of fiduciary duty owed to the Tribe by Kaufman as the principal of the manager of the Tribe's Akwesasne casino. More specifically, the Catskill Group contends that Kaufman improperly used his position at Akwesasne to "slow" that casino's payroll, in an attempt to put a financial "squeeze" on the Tribe, with the ultimate aim of inducing the Tribe to look to Park Place for a financial bailout. The Catskill Group contends that Kaufman was motivated by the significant fee allegedly promised to him by Park Place in the event that Park Place took over the management contract at Akwesasne and/or entered into a contract with the Tribe for a new casino in the Catskills.

In *Hannex Corp.*, we recognized that the commission of the tort of knowing participation in a breach of fiduciary duty supports a finding of wrongful means. 140 F.3d at 206. The elements of that tort are: (1) a breach by a fiduciary of obligations to another; (2) the defendant's knowing inducement of or participation in the breach; and (3) damages suffered by the plaintiff from the breach. *Id.* at 203. With respect to the second element, "[o]ne participates in a fiduciary's breach if he or she affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables it to proceed." *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 284 (2d Cir. 1992), *overruled on*

*other grounds by Gerosa v. Savasta & Co.*, 329 F.3d 317, 319 (2d Cir. 2003).

As factual support for its claim that Park Place knowingly participated in Kaufman's alleged breach of duty to the Tribe, the Catskill Group relies almost exclusively on an excerpt from a taped conversation on February 16, 2000 between Kaufman and Cummis:

> KAUFMAN: . . . But you got to remember the pressure on them with how we're squeezing them in Akwesasne is huge. I mean they—you know, I have kind of delayed their payrolls and—
>
> CUMMIS: Yeah.
>
> KAUFMAN: —slowed it down so badly that, you know, they're looking at Arthur as the savior [i.e., Arthur Goldberg, Park Place's then-CEO].
>
> CUMMIS: Yep, they are.
>
> KAUFMAN: And it is great. I mean I never would have thought that you would have gotten where you have gotten, but I guess Arthur is a genius.
>
> CUMMIS: He's pretty good. I'm not bad. He's pretty good.
>
> KAUFMAN: You must be a hell of a team.
>
> CUMMIS: Yeah.
>
> KAUFMAN: I mean I have been around a little bit, but not as much as you guys. But to take a situation like this—remember we started with our letter of intent and they said never would they

give an exclusive.

CUMMIS: Yeah.

KAUFMAN: But you guys can maneuver. I'm impressed.

CUMMIS: They've given it to us now. Now, we had better get together about the financial situation.

* * *

The Catskill Group contends that reasonable jurors could infer from this conversation that Park Place: (1) devised the alleged scheme to financially squeeze the Tribe; (2) provided advice or encouragement to act; (3) provided financial comfort to Kaufman by offering him money in the event that Park Place took over the management of Akwesasne; and (4) ratified Kaufman's breach by entering into agreements with the Tribe notwithstanding Park Place's knowledge of Kaufman's breach.

The first two contentions warrant little discussion. The tape at most suggests that Park Place knew about Kaufman's plan to financially squeeze the Tribe through payroll slowdown. There is no evidence, however, that Park Place devised the scheme. Moreover, given that the conversation in the tape occurred *after* the payroll slowdowns, the tape itself cannot be used to demonstrate that Park Place provided advice or encouragement to act.

The Catskill Group's remaining contentions warrant closer scrutiny, however. With respect to their "financial support" theory, the Catskill Group principally relies on *S & K Sales Co. v. Nike, Inc.* 816 F.2d 843 (2d Cir. 1987), in which we held that the defendant had participated in the breach of a third-

party's fiduciary duty to his employer, the plaintiff. *Id.* at 850. Although it is fair to assume from the facts of that case that the third-party took comfort in breaching his duty to plaintiff in light of defendants' offer of employment to the third-party, it was not on that basis—and certainly not on that basis alone—that we found the defendant to have knowingly participated in the breach of fiduciary duty. Rather, unlike in this case, the evidence in *S & K Sales Co.* was that the defendant directly and concretely participated in the breach of duty by, *inter alia,* (1) sending misleading letters to the plaintiff on the basis of the third-party fiduciary's request, and (2) authorizing the third-party fiduciary to solicit the plaintiff's employees to work for defendant. *Id.* Thus, even if Park Place had assured Kaufman of financial comfort to induce his alleged breach of duty, we believe that assurance is insufficient, on its own, to establish the participation necessary to support a claim.

Nor is Park Place's alleged ratification of Kaufman's breach sufficient, either alone or in combination with plaintiff's other assertions, to establish wrongful means. The Catskill Group's "ratification" theory is drawn principally from *Diduck,* in which we affirmed the district court's finding that a defendant had participated in a union official's breach of fiduciary duty to an ERISA fund. 974 F.2d at 284. We held that the defendant's continued association with the union official and underpayments to the union, after the defendant was put on notice of the breach, crossed the threshold of tortious participation:

> Once put on notice of the breach, [the

> defendant] could not continue its association with [the union official] as if his conduct were not questionable. Its failure to inquire into the propriety of that conduct and take appropriate action was a substantial factor facilitating the breach. Making payments that [the defendant] knew or should have known "short-changed" the funds effectively ratified [the union official's] conduct.

*Id.*

*Diduck* is distinguishable, however, because the defendants' conduct of, *inter alia,* making short payments to the ERISA fund proximately caused a portion of the alleged injury. *See id.* In stark contrast, Park Place's dealings with Kaufman *after* the alleged breach occurred were not a substantial factor causing the Catskill Group any harm.

Moreover, the Catskill Group's claim that Park Place should be accountable simply because it continued associating with Kaufman after, and with knowledge of, his alleged breach cannot be squared with our decision in *S & K Sales Co.* There, we questioned the propriety of a jury instruction that permitted a finding of liability if the defendant "participated in [the thirdparty's] breach of his duty of loyalty, *or* that [defendant] knowingly accepted the benefits of [the third-party's] breach of his duty of loyalty." *S & K Sales Co.,* 816 F.2d at 849. It was the instruction's disjunctive "or"—and in particular the "knowing[] accept[ance]" prong of it—that troubled us. Ultimately, we did not in *S&K* resolve the issue of whether the challenged instruction was legally erroneous, because we found no prejudice to the

defendant in light of the charge as a whole, which made clear that liability could attach only if the defendant both participated in the third-party's breach *and* if the defendant accepted the benefits of the breach. *Id.* at 849–50.

We now hold what we intimated in *S & K Sales Co.*: the knowing acceptance of benefits alone is insufficient to sustain a claim for *participating* in the breach of a fiduciary duty. *See id.* At 849 ("Nike could not have been prejudiced because the charge as a whole correctly conveyed to the jury the proper standard and emphasized the element of 'participation' as the essence of the claim.").

### C. Park Place's Allegedly Improper Economic Pressure

Finally, we reject the Catskill Group's claim that Park Place used wrongful means, in the form of economic pressure, to interfere with the Catskill Group's business relations with the Tribe. In particular, the Catskill Group claims that Park Place sought to capitalize on the Tribe's financial difficulty by agreeing to loan the Tribe $3 million in exchange for a contract giving Park Place exclusive development rights with the Tribe.

In *Carvel Corp.*, the New York Court of Appeals explained that for economic pressure to constitute wrongful means, such pressure must have been for the "sole purpose of inflicting intentional harm on plaintiffs." 3 N.Y.3d at 190, 785 N.Y.S.2d at 362, 818 N.E.2d at 1103 (quoting *NBT Bancorp, Inc.*, 215 A.D.2d at 990, 628 N.Y. S.2d at 408–10). There is no evidence of that here; indeed, the evidence shows that Park Place offered the loan to promote its own legitimate business interests in the gaming industry.

As the district court succinctly explained:

> The situation here is relatively simple. The Tribe needed money. Park Place had money. The Tribe asked Park Place for money. Park Place had no obligation to give the Tribe any money. So it bargained with the Tribe. Both parties came to the decision that an exclusive casino development contract was a fair trade for the immediate $3 million loan. That is not improper economic pressure.

*Catskill III*, 217 F. Supp. 2d at 439. We agree.

Because the Catskill Group has failed to present a triable issue of fact on the required element of wrongful means, we affirm the district court's grant of summary judgment to Park Place dismissing the tortious interference with business relations claim.

## CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgments.

# OPPOSITION BRIEF

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(2)

No. 08-655

Supreme Court, U.S.
FILED
DEC 24 2008
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

HARRAH'S OPERATING COMPANY, INC.,
a Delaware Corporation,

*Petitioner,*

v.

NGV GAMING, LTD., a Florida
Limited Partnership,

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Is there a "Circuit split" between the Ninth and Second Circuits regarding the scope and application of 25 U.S.C. § 81 so as to implicate this Court's certiorari jurisdiction?

II. Does the Dictionary Act alter the plain meaning of "Indian lands," as defined in 25 U.S.C. § 81, thereby expanding the scope and application of Section 81 to include contracts where no Indian lands actually exist?

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent NGV Gaming, Ltd. states that it has no parent corporation, nor is there any publicly held company that owns 10% or more of its stock or equity interest.

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## STATEMENT OF THE CASE

### Proceedings Below

On September 20, 2004, NGV Gaming, Ltd. ("NGV" or "Respondent") filed District Court Case No. 3:04-CV-03955 SC (N.D. Cal.) against Harrah's Operating Company, Inc. ("Harrah's" or "Petitioner") and Upstream Point Molate, LLC ("Upstream") (collectively "Developers") for intentional interference with contractual relations. NGV sought money damages to redress the tortious conduct of Developers in having induced the Guidiville Band of Pomo Indians ("Tribe") to terminate its contracts with NGV for the development and construction of a proposed gaming facility on the Tribe's not-yet-acquired (nor identified) restored trust land in Northern California. (NGV's Excerpts of Record ("ER") Vol. I, pp. 1-14).[1]

Harrah's moved to dismiss NGV's complaint arguing, *inter alia*, that the contracts between NGV and the Tribe were invalid as a matter of law in that said contracts encumbered Indian lands and were not approved by the Secretary of the Interior as required by 25 U.S.C. § 81. (ER Vol. II, pp. 239-245). Harrah's contended that such void contracts could not support a claim of tortious interference under California law. NGV argued that Section 81 had no application to a

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[1] ER Vol. I and II refer to the Excerpts of Record in District Court Case No. 3:04-CV-03955 and ER Vol. III refers to the Excerpts of Record in District Court Case No. 3:05-CV-01605. *See* Sup. Ct. R. 12.7.

contract that did not implicate already existing Indian lands and otherwise pertained solely to lands yet-to-be-acquired. *Id.* On January 31, 2005, the district court denied the motion to dismiss on the grounds that Section 81 appeared to apply only to contracts that encumber *existing* Indian trust lands. (ER Vol. II, pp. 243-244).

Thereafter, on April 15, 2005, the Tribe filed District Court Case No. 3:05-CV-01605 SC (N.D. Cal.) seeking a judicial declaration that the subject contracts were invalid. (ER Vol. III, pp. 1-17). The district court ordered the actions consolidated for purposes of discovery and motion practice.

On July 28, 2005, Developers and the Tribe moved in each case, respectively, for summary judgment. On October 19, 2005, the district court entered its Order and Judgment granting declaratory relief to the Tribe in Case No. 3:05-CV-01605 and dismissing NGV's complaint in Case No. 3:04-CV-03955. The district court held that Section 81 applied in the absence of existing lands in trust, thus expanding the scope of Section 81 beyond that determined by any other court and rejecting the reasoning of its January 31, 2005 ruling. NGV timely appealed.

On June 26, 2008, the Ninth Circuit reversed the grant of summary judgment in favor of Harrah's in Case No. 3:04-CV-03955 and vacated the declaratory judgment in favor of the Tribe, dismissing Case No. 3:05-CV-01605 for lack of subject matter jurisdiction. On August 13, 2008, Harrah's petition for rehearing

and rehearing *en banc* was denied with no judge of the Ninth Circuit requesting a vote. Pet. App. 63-64.

**Facts**

In January, 2004 Upstream was awarded an Exclusive Right to Negotiate by the City of Richmond, California in connection with a potential sale by the City of approximately 400 acres at Point Molate for the purpose of constructing a large Indian casino, shopping mall and hotel. (ER Vol. I, p. 7, ¶19 and p. 132; Vol. II, p. 253, ¶10). Acting through intermediaries, Upstream reached out to Harrah's in late March, 2004, to serve as the gaming and financial member of the project.

In early April, 2004, Harrah's requested that the Tribe become its Indian gaming partner at Point Molate. (ER Vol. II, p. 339:3-15; Vol. III, p. 6, ¶40). From the outset, Harrah's was fully aware of the Tribe's contractual relationship with "another developer/ investor" (referring to NGV). (ER Vol. II, pp. 326:7 to 327:16; pp. 328:14 to 329:11). Despite knowledge of the pre-existing contracts, Harrah's continued its tortious interference including, but not limited to, offering the Tribe a substantially higher monthly maintenance fee than NGV was paying, finalizing negotiations with the Tribe for a management and development agreement which required the Tribe to terminate its contracts with NGV, and agreeing to guarantee a Land Disposition Agreement between Upstream and the City of Richmond for the purchase

of Point Molate. (ER Vol. I, pp. 170-186 and Vol. II, pp. 332:21 to 333:7; p. 358:6-19; pp. 370:2 to 371:9). Throughout the four months of its negotiations with Harrah's, the Tribe continued to accept approximately $40,000 per month from NGV as monthly maintenance and caused NGV to expend considerable additional expenses in obtaining land to be placed in trust upon which the casino was to be built. (ER Vol. II, p. 293, ¶¶14-16).

In mid-June, 2004, Harrah's and the Tribe exchanged drafts of letters of intent. Harrah's requested that the Tribe make a false representation and warranty that the proposed agreements would not interfere with its existing contracts with NGV. When the Tribe balked at having to "warrant a lie," Harrah's required instead that the Tribe warrant its belief that the NGV contracts were "void or voidable" and provide indemnification (from the Tribe's share of future gaming revenues) in the event Harrah's was sued for tortious interference. (ER Vol. II, pp. 377:1 to 378:24; pp. 382:4 to 383:18).

In an effort to build support for the position that the NGV contracts were invalid, the Tribe approached the National Indian Gaming Commission ("NIGC") and the Bureau of Indian Affairs ("BIA") in June, 2004. (ER Vol. III, p. 7, ¶48; p. 11, ¶72). At this point, Harrah's and the Tribe had already exchanged letters of intent regarding their proposed venture which required the Tribe to terminate its relationship with NGV. (ER Vol. II, p. 369:3-25; pp. 370:2 to 371:9). Upon information and belief, the Tribe approached

these agencies with the explicit intent of having the agency disapprove the Tribe's pre-existing contracts with NGV. Harrah's apparently funded this effort by the Tribe's attorneys. (ER Vol. II, pp. 364:12 to 366:25).

On August 2, 2004, in furtherance of its obligations to Harrah's, the Tribe sent a letter to NGV announcing its decision "to rescind" the NGV contracts on a variety of grounds which were entirely pretextual. (ER Vol. I, p. 216). In the same month, Harrah's and the Tribe entered into a series of management/development contracts for an Indian casino at Point Molate. Petition at 8.

In March, 2007, while this case was pending in the Ninth Circuit, Harrah's and the Tribe terminated their agreements in secret without disclosing the termination to either NGV or the Court.[2]

## SUMMARY OF ARGUMENT

The only question of substance presented by this Petition involves the interpretation of 25 U.S.C. § 81, not 1 U.S.C. § 1, the Dictionary Act (the "Act"). The latter is a tool of statutory construction, not a provision of substantive law. By the very nature of the Act,

[2] The Ninth Circuit found this concealment by Harrah's "most disturbing" since it impacted upon the jurisdictional concerns surrounding the Tribe's action for declaratory relief. *See* Pet. App. 11, n. 7.

its application will vary from case to case. "It [the Act] looks first to 'context,' and only if the 'context' leaves the meaning [of the underlying statute] open to interpretation does the [Act's] default rule come into play." *Guidiville Band v. NGV Gaming, Ltd.*, 531 F.3d 767, 776 (9th Cir. 2008). [Added.] It is not remarkable then that the Act impacts different substantive statutes differently. The degree of deference afforded the Act by the Ninth Circuit in *Guidiville* and, most recently, by the Second Circuit in *Catskill Development, LLC v. Park Place*, 547 F.3d 115 (2nd Cir. 2008), hardly evinces a "Circuit split" since the cases involved wholly separate and distinct provisions of Title 25. To be sure, both *Guidiville* and *Catskill* were correctly decided and are entirely consistent with each other.

*Petitioner's dilemma is apparent. It can point to no reported decision, on any level, which conflicts with the decision below regarding the scope and application of Section 81.* Instead, Petitioner mischaracterizes dictum in *Catskill* regarding the Dictionary Act as a "holding" in a futile effort to establish certiorari jurisdiction. Building on this confusion, Petitioner fabricates the vagaries of the Dictionary Act into a "policy crisis" between the Second and Ninth Circuits which simply does not exist. The Ninth and Second Circuits were dealing with fundamentally different contracts which were governed by separate statutes and reviewable by separate agencies. Both cases correctly interpreted the respective statutes at issue

and are easily reconciled with or without regard to the Act.

As the *Guidiville* majority correctly noted, "[t]his appeal presents the single, seemingly straightforward question whether the word 'is' really means 'is' at least as that word is employed in 25 U.S.C. § 81." *Guidiville* at 769. The majority, relying upon the "succinct directive" in several cited Supreme Court cases regarding statutory construction, found the language used in Section 81 "specific and unambiguous" in defining the term "Indian lands." *Id.* at 774-777. The majority further observed that its interpretation of the statute (limiting its application to only those contracts pertaining to *existing* Indian lands) was fully supported by the unworkability of a contrary construction, the agency's own policy under two administrations and the legislative history of Section 81. *Id.* at 777-781.

The Ninth Circuit held that Indian lands must actually and presently exist to require compliance with 25 U.S.C. § 81 regardless of whether the Dictionary Act is read against the definition of "Indian lands" in Section 81(a)(1). This is so, according to the *Guidiville* court, because either (1) the "contextual indicators" in Section 81 preempt application of the Dictionary Act's default rule of construction which would otherwise expand the definition of Indian lands beyond that which Congress intended; or (2) the definition of Indian lands in Section 81 is clear and

unambiguous and requires no extraneous interpretive tools.[3] *Id.* at 776-777.

## REASONS FOR DENYING THE WRIT

The decision below regarding the scope and application of Section 81 does not conflict with any decision of this Court, any Court of Appeals or any state court of last resort. Moreover, Petitioner does not allege that the case involves an important question of federal law that has not been, but should be, settled by this Court. In essence, Petitioner merely argues that "the asserted error consists of . . . the misapplication of a properly stated rule of law" (*i.e.*, the Dictionary Act), a basis upon which a petition "is rarely granted." *See* Sup. Ct. 10. The Petition fails to establish "compelling reasons" for this Court to grant further review and, thus, the Petition for Writ of Certiorari must be denied.

[3] The outcome is the same whether the Dictionary Act is not considered at all because the statutory definition of "Indian lands" is clear on its face or the Act is considered but the contextual indicators in § 81 preempt the Act's default rule of construction.

## I: There Is No Circuit Split Between The Ninth And Second Circuits To Support Certiorari Jurisdiction

Petitioner claims that the decision below is in "irreconcilable conflict" with the Second Circuit Court of Appeals decision in *Catskill Development, LLC v. Park Place*, 547 F.3d 115 (2nd Cir. 2008). (Petitioner is the consolidated defendant in *Catskill*.). Petitioner argues that the *Catskill* decision creates the requisite "Circuit split" with the case at bar upon which this Court's certiorari jurisdiction may be predicated. *See* Sup. Ct. Rule 10. Petitioner is flat-out wrong. A full and fair examination of *Catskill* and the Ninth Circuit's decision in this case completely negates any claim of a Circuit split. Both cases were correctly decided and are entirely consistent with one another.

### A. *Guidiville* and *Catskill* Involved the Interpretation of Different Statutes

It must be underscored that *Catskill* did *not* involve the interpretation of 25 U.S.C. § 81 which requires Secretarial approval of those contracts that encumber Indian lands for seven or more years. It is the interpretation of Section 81, an issue not reached in *Catskill*, and not the Dictionary Act, that is at the core of this case. The Ninth Circuit held that absent existing Indian lands, Section 81 by its very terms simply does not apply. *Guidiville Band v. NGV Gaming*,

*Ltd.*, 531 F.3d 767, 783 (9th Cir. 2008).[4] *Catskill*, on the other hand, involved the interpretation of the governing statutes relating to gaming management contracts, 25 U.S.C. §§ 2710(d)(9), 2711. The net effect of the governing statutes and the NICG's implementing regulations[5] is to require that agency's approval for management contracts[6] as a precondition to their validity without any consideration as to whether "Indian lands" exist. *See Catskill*, Pet. App. 81 *et seq.*

Unlike Section 81, on which the instant case turns, neither the governing statutes nor the implementing regulations for management contracts make any reference to Indian lands. This critical point was recognized by the Second Circuit:

> "To begin with, the NIGC's authority to approve management contracts does not appear to hinge on whether the contract relates to Indian lands. Neither the governing statutes relating to gaming management contracts, 25 U.S.C. §§ 2710(d)(9), 2711, nor the NIGC's implementing regulations, 25 C.F.R. §§ 533.1, 533.7* expressly require that a gaming contract relate to Indian lands for it to be

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[4] References hereinafter to the *Guidiville* and *Catskill* opinions will be to the page in Petitioner's Appendix.

[5] *See* 25 C.F.R. §§ 533.1, 533.7 set forth in full at Pet. App. 81, n. 15.

[6] All agreements collateral to a management agreement must be approved by the NIGC as well. This would include all of Petitioner's agreements with the Tribe but *exclude* NGV's contracts. *See* 25 C.F.R. §§ 502.5, 502.15.

> subject to NIGC approval. Indeed, the absence of any mention of "Indian lands" in §§ 2710(d)(9) or 2711 stands in contrast to many of the surrounding statutory provisions, which are *expressly* limited in some way to Indian lands." [*Note omitted.]

*Catskill*, Pet. App. 81-82. Despite the different statutory provisions at issue in *Guidiville* and *Catskill*, Petitioner claims *Catskill* "conflicts" with *Guidiville* so as to trigger certiorari jurisdiction. In support, Petitioner relies solely upon qualified dictum in a footnote in *Catskill* regarding the Dictionary Act which was an alternative and non-essential basis for its holding.[7]

A more comprehensive review of the *Catskill* footnote upon which Petitioner relies reflects the acknowledgement by the Second Circuit that *Guidiville* involved a distinctly different statutory provision and, therefore, is readily distinguishable from *Catskill*. In that regard, the Second Circuit stated as follows:

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[7] The *Catskill* court premised its holding, correctly, on the absence of any statutory requirement of there being "Indian lands" as a predicate to the operation of §§ 2710(d)(9) and 2711. The court then made cursory reference to the Dictionary Act in response to a hypothetical "Indian lands" requirement in the governing statutes at issue. All told, the Second Circuit devoted less than a dozen lines to a tangential discussion of the Dictionary Act. *Catskill*, Pet. App. 82. In contrast, the *Guidiville* majority committed nine full pages to a detailed and thorough analysis of the Act in the context of § 81. Pet. App. 15-24.

> "In *Guidiville*, the Ninth Circuit addressed the meaning of "is" in the context of 25 U.S.C. § 81's definition of Indian lands. The majority opinion concluded, in that context, that "is" should be given its literal meaning and that the Dictionary Act did not apply because the "context" in which the term was used appeared to indicate that Congress did not intend "is" to mean "will be." *Guidiville* is distinguishable insofar as it was interpreting § 81, which expressly pertained to encumbrances of "Indian land," rather than to management contracts. Moreover, in *Guidiville*, no land had yet been acquired or even identified for gaming purposes by either of the contracting parties. *To the extent these differences are not material to the Ninth Circuit's majority opinion*, we nevertheless agree with Judge Smith's dissenting view that transactions involving land that 'will be' held in trust trigger the agency's review authority, especially where specific land to be taken into trust is identified in the operative agreements." [Citations omitted.]

*Catskill*, n. 16, App. 82-83 [Emphasis added.]

Read in its full context, the footnote merely says that the Second Circuit *would* disagree with the *Guidiville* majority regarding the inapplicability of the Dictionary Act's default rule should the Ninth Circuit's opinion with respect to the scope of Section 81 be read to require existing Indian lands as a predicate to the NIGC approval requirement in

Sections 2710(d)(9) and 2711 for management contracts. However, the Ninth Circuit expressed no such opinion. *To the contrary*, the Ninth Circuit applied the *same* rule of law adopted in *Catskill* in determining that the management contract between Petitioner and the Tribe was void for lack of NIGC approval, despite the absence of Indian lands.[8] The Ninth Circuit held that the Tribe lacked subject matter jurisdiction to pursue its action for declaratory relief against Respondent where such jurisdiction had been premised on an indemnification obligation contained in its unapproved, and thus void, management contract with Petitioner. *See Guidiville*, Pet. App. 10-12.

The harmony between the Ninth and Second Circuit views is spelled out in the following footnote in *Guidiville*:

> "Because the Tribe's agreement with Harrah's was subject to a different statutory provision from the section [referring to § 81] applicable to the Tribe's agreement with NGV, such Section 2705(a)(4) [which refers back to §§ 2710(d)(9) and 2711] invalidity did not extend to the latter." [Added.]

*Guidiville*, n. 6. App. 10-12. Thus, it is evident that the Ninth Circuit would have concurred with the outcome in *Catskill* in voiding an unapproved management

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[8] No Indian lands ever existed which were pertinent to either NGV's non-management contract or Petitioner's management contract with the Tribe.

contract regardless of whether Indian lands existed. Accordingly, the Second Circuit's explicitly contingent support for the dissent in *Guidiville* is of virtually no consequence.[9]

In sum, nothing in *Catskill*, by way of either its holding or essential reasoning, gives rise to any conflict with the Ninth Circuit's decision in *Guidiville*. Similarly, *Guidiville* is entirely consistent with, and supportive of, the outcome in *Catskill*. As this Court has often stated, "[w]e sit, after all, not to correct errors in dicta; 'this Court reviews judgments, not statements in opinions.'" *Bunting v. Mellon*, 541 U.S. 1019, 1023 (2004). [Citation omitted.]

### B. There is No "Contractual or Regulatory Uncertainty" Arising From the Decisions of the Ninth and Second Circuits

Petitioner has made a transparent attempt to mislead this Court by using the functionally distinct contractual relationships identified in *Guidiville* and *Catskill* to confuse two entirely separate statutory

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[9] Only the result and those portions of an opinion necessary for that result are binding; the rest is mere *obiter dicta*. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). *Catskill's* conditional support for the dissent in *Guidiville* is even less compelling than dicta since it was premised on an apparent misreading of the majority's view regarding management contracts. *Guidiville*, as well as *Catskill*, holds that management contracts not approved by the NIGC are invalid irrespective of whether trust lands exist. *Guidiville*, Pet. App. 10-11 and n. 6, 7.

schemes.[10] Petitioner ignores the fundamentally different character and focus of Section 81 from that of Sections 2710(d)(9) and 2711. The former provision governs the Interior Secretary's review and approval of contractual encumbrances upon Indian trust land, without regard to gaming. The plain language of the statute makes clear that such trust lands must be in existence as a predicate to such review. The latter provisions, which make no reference to trust lands, govern the authority and obligation of the NIGC to review Indian gaming management contracts without regard to whether "Indian lands" exist. *See Catskill.* Pet. App. 81-82.

The respective provisions are administered by entirely separate federal entities. In the case of Section 81, it is the Secretary of the Interior; in the case of Sections 2710 and 2711, it is the NIGC which is outside the jurisdiction of the Department of Interior.

Each agency has already interpreted the statutes within its jurisdiction in a manner fully supportive of

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[10] Petitioner misstates the record when it says, referring to *Catskill* and *Guidiville*, that "[e]ach case involved contracts that implicated Indian trust lands." Pet. App. 13. By their nature, management contracts do *not* implicate trust lands but nonetheless require NIGC approval under §§ 2710(d)(9) and 2711. This was the holding in both *Guidiville* and *Catskill*. Non-management, development contracts may implicate Indian lands and require Secretarial review under § 81 but only if such Indian lands presently exist, as *Guidiville* held and *Catskill* did not contradict.

the decisions in *Guidiville* and *Catskill*.[11] No "uncertainty for the pertinent federal agencies" exists as alleged by Petitioner. *See* Petition at 15. Nor is there any basis for Petitioner to allege that contracting tribes and developers will labor under "contractual uncertainty" in the wake of *Catskill* without intervention by this Court. *See* Petition at 14. Neither *Guidiville* nor *Catskill* suggest, let alone hold, that management contracts require approval by the NIGC only if "Indian lands" actually exist. In fact, *both* cases hold just the opposite. As a practical matter, management contracts are almost always drafted and executed in advance of Indian lands being obtained and routinely acknowledge the necessity of NIGC approval as a condition precedent to their enforceability. Petitioner's own management contract with the Tribe for the ill-fated Point Molate project is a perfect example. *See* Pet. App. 10-11 and n. 6, 7. By its terms, Petitioner's management contract acknowledged the need for NIGC approval even though no land in trust existed. *Id.*; Appellant's Reply Brief pp. 3-4.

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[11] In a letter dated April 13, 2005, the BIA set forth its policy that a § 81 review occurs only when there is actual land in trust as opposed to "the possibility of acquiring actual trust lands." *Guidiville*, Pet. App. 81. This policy was confirmed by the Affidavit of Kevin Gover, the former Assistant Secretary for Indian Affairs. *Id.*; *see also* n. 17, *infra*. Management contracts and agreements collateral to such management contracts are reviewed by the NIGC without regard to whether trust lands currently exist. *Catskill*, Pet. App. 85, 90-94. *Guidiville*, Pet. App. 10.

Petitioner's concern about "unscrupulous developers [attempting] to evade federal agency review and take advantage of Indian tribes . . . " is entirely overwrought. Petition at 16. As the *Guidiville* majority noted:

> "[A]ny concern that NGV was trying to game the system by executing its contract with the Tribe before transferring land into trust is wholly unfounded. Instead any *later* effort to take lands into trust triggers an extensive review process by the Secretary – a review that is far more meaningful than any Section 81 proceeding that would deal with not-yet-identified lands that might be taken into trust in the future, because a Section 465 proceeding addresses the suitability of a *specific* parcel of land in *all* respects, rather than a totally speculative process that is necessarily involved when a presently unknown future acquisition is sought to be made the subject of an attempted analysis."[12]

Pet. App. 21 [emphasis in original]; *see also* n. 17, *infra*.

Petitioner's concern about unscrupulous developers is also hypocritical. Petitioner was sharply chastised by the Ninth Circuit for concealing from both

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[12] 25 C.F.R. § 84.004(a) states that "contracts and agreements otherwise reviewed and approved by the Secretary under this title or other federal rule or regulation – do not require Secretarial approval under this part [the regulations referring to Section 81]." [Added.]

the Court and Respondent the fact that it had terminated its original agreement with the Tribe some seven months prior to oral argument. *See* Pet. App. 11, n. 7. As the Court noted, it was the terminated contract (containing the "indemnification obligation covering NGV's claims against Harrah's," *Id.* at 10) which served as "the peg on which the Tribe sought to hang its jurisdictional hat." *Id.* at 11, n. 7. The Court went on to reject any jurisdictional bootstrapping by a "new indemnification obligation as part of an agreement to terminate [the Tribe's] already void contract with Harrah's – *an indemnification promise that is wholly lacking in consideration and is hence itself invalid.*" *Id.* at 11. [Emphasis added.] The real irony is that although NGV has fully released the Tribe from any liability, Harrah's continues to hold the Tribe hostage to an invalid indemnification agreement. *Id.* at 10-11.

## II: The Dictionary Act Does Not Alter The Plain Meaning Of "Indian Lands" As Used in 25 U.S.C. § 81

The *Guidiville* court correctly determined that the Dictionary Act does not alter the meaning of 25 U.S.C. § 81 with respect to the definition of the term "Indian lands." The Act states, *inter alia*, that "[i]n determining the meaning of any Act of Congress, *unless the context indicates otherwise* . . . words used in the present tense include the future as well as the present." [Emphasis added.] Petitioner focuses on the word "is" in Section 81(a)(1): "Indian lands means

lands the title to which *is* held by the United States in trust for an Indian tribe. . . ." [Emphasis added]. In effect, Petitioner argues that the word "is" should be construed to mean the future tense as well, so as to expand the definition of Indian lands to include lands the title to which *may, in the future, be held* by the United States in trust for an Indian tribe.

In light of Section 81's unambiguous definitional language and its "contextual indicators" under *Rowland v. California Men's Colony*, 506 U.S. 194, 211 (1993), such an expansion is neither permissible nor practical.[13]

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[13] Contrary to Petitioner's hyperbolic claim that the opinion below "essentially reads out of existence the Dictionary Act's present-tense-equals-future-tense rule," *see* Petition at 14, the majority carefully applied the "unless-the-context-indicates-otherwise-qualification" contained in the Act in reaching its conclusion. *See Guidiville*, Pet. App. 15-24. In its original brief to the Ninth Circuit, Harrah's failed to even cite the Dictionary Act as grounds to expand the scope of § 81. The Court of Appeals raised the issue *sua sponte* and requested both sides submit supplemental briefs on the application of the Act. *Id.* at 15, n. 8. The majority then devoted nine pages of its opinion to discussing the Act and the relevant "contextual indicators." Surely, it cannot be said that the majority ignored or failed to apply the Act; instead, the Court applied the Act's directive to first consider the "context" of the statutory language at issue before deciding whether to apply the Act's default rule of construction. *See id.* at 15-24.

### A. By Its Own Terms, The Dictionary Act Does Not Impact Section 81

The Dictionary Act excludes from the operation of its rules any Act of Congress where the "context [of such Act] indicates otherwise." The term "context" means "the text of the Act of Congress surrounding the word at issue, or the text of other related Congressional Acts, and this is simply an instance of the word's ordinary meaning. . . ." *Rowland* at 199.

The use of the word "indicates" as contemplated by the Dictionary Act broadens the meaning of "context." *Id.* at 200. "The Dictionary Act's very reference to contextual 'indication' bespeaks something more than an express contrary definition, and *courts would hardly need direction where Congress had thought to include an express, specialized definition for the purpose of a particular Act. . . .*" *Id.* [Emphasis added.] The true purpose of the "qualification 'unless the context indicates otherwise' . . . [is] in excusing the court from forcing a square peg into a round hole." *Id.* The term "indicates," according to *Rowland*, "certainly imposes less of a burden than, say, 'requires' or 'necessitates.'" *Id.* No more is needed "to excuse the poor fit" of the rule than "a contrary 'indication' [which] may raise a specter short of inanity, and with something less than syllogistic force." *Id.* at 200-01.

Section 81(b) states: "[n]o agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the

Secretary. . . ." Thus, the statute requires at least two threshold elements be established: first, the existence of an "Indian tribe" with which the agreement or contract was made and, second, the existence of "Indian lands" which the agreement or contract encumbers for 7 or more years.

Section 81(a)(2) incorporates by reference 25 U.S.C. § 450b(e) which defines "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community . . . which *is recognized* as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." [Emphasis added.] Certainly, no credible argument can be made that any such band or group which lacks present federal recognition would qualify as an Indian tribe under Section 450b(e) or Section 81(a)(2). It would be a tremendous regulatory burden to require oversight of contracts with groups not having status as a federally recognized tribe.

By using the present tense, "is recognized," Congress made explicitly clear that such tribal status must presently exist as a predicate to the application of Section 81(b) regarding an "agreement or contract with an Indian tribe." Similarly, in Section 81(a)(1), Congress chose to use the same present tense in defining "Indian lands" as "lands the title to which *is held* by the United States in trust for an Indian tribe. . . ." [Emphasis added.] This similarity is telling. Where "Congress used the *same* tense in both elements, we give both the same temporal reach, absent some reason to do otherwise." [Emphasis in

original.] *United States v. Jackson*, 480 F.3d 1014, 1020-21, n. 11 (9th Cir. 2007) ("conjoined use of present tense verbs informs statutory interpretation").[14] There is no reason to alter the temporal reach of the term "is held" (referring to Indian lands) from the obvious temporal reach of the term "is recognized" (referring to Indian tribes) both of which appear in the same subsection of Section 81. Both elements must presently exist before requiring compliance with Section 81(b). "We should not read in a temporal distinction Congress failed to make." *Id.* at 1021.

The issue of when such Indian lands must exist has been addressed in another section of Title 25. 25 U.S.C. § 2710(d)(3)(A) is a "related congressional Act" under *Rowland* and, therefore, its text is relevant in determining the context of the language at issue in Section 81.[15] That section provides that "[a]ny Indian tribe having jurisdiction over Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the state in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State Compact governing the conduct of gaming activities." Should

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[14] This Court has recognized that verb tense as used by Congress is important in construing statutes. *See, e.g. United States v. Wilson*, 503 U.S. 329, 333 (1992); *Otte v. United States*, 419 U.S. 43, 49-50 (1974); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 63-64, n. 4 (1987).

[15] Unlike §§ 2710(d)(9) and 2711 which deal with gaming management contracts and which were at issue in *Catskill*, § 2710(d)(3)(A) specifically references "Indian lands" as does § 81.

the state fail to enter into such negotiations, Section 2710(d)(7) provides the tribe with a series of remedies, including the right to initiate an action against the state in the district court. In order to bring such an action, however, the tribe must show that it has Indian lands at the time of filing. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616 (6th Cir. 2002). The rights and remedies under Section 2710(d) do not apply in the absence of existing Indian lands. *Id.* at 617-18. Similarly, Section 81 does not apply in the absence of existing Indian lands.

*Guidiville* quoted with approval the decision and reasoning of the Sixth Circuit in *Match-E-Be* as to why Indian lands must actually exist at the time of the action, as opposed to in the future:

> "Under § 2710(d)(3)(A), it is clear that the State does not have an obligation to negotiate with an Indian tribe until the tribe has Indian lands. The purposes of this requirement appear to be to ensure that the casino will be inside the borders of the State, to give the State notice of where it will be, and to require the tribe to have a place for the casino that has been federally approved. If the Indian tribe does not have any land in the State that can be used for a casino, why should the State waste its time negotiating about such a casino? In the absence of a location, the State would have no way to assess the environmental, safety, traffic, and other

> problems that such a casino could pose." 304 F.3d at 618.

*Guidiville*, Pet. App. 22.

This analysis was also adopted in *Mechoopda Indian Tribe of Chico Rancheria, California v. Schwarzenegger*, 2004 U.S. Dist. LEXIS 8334 (E.D. Cal. 2004). There, unlike the case at bar, the tribe already owned in fee simple a 645 acre parcel for which a fee-to-trust application was pending before the Secretary. Nonetheless, the case was dismissed on the grounds that the tribe failed to establish the existence of Indian trust lands at the time of filing its action. "The statute's use of the present tense denotes current jurisdiction over Indian lands." *Id.* at *15. The same bright line exists in Section 81 which shares a common operational predicate of existing "Indian lands" with Section 2710(d)(3)(A).[16]

Here, the Secretary would be faced with an even greater difficulty in reviewing a contract allegedly encumbering land where no Indian land had ever been acquired or identified, let alone taken into trust. It would require the Secretary to make a determination as to whether to approve such a contract in the absence of any information regarding, for example, the size and cost of the parcel, its character and location, financing considerations, the demographics

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[16] In contrast, § 2710(d)(9), which governs management contracts, and which was the focus in *Catskill*, does *not* require there to be existing "Indian lands" as an operational predicate.

and needs of the community as well as critical environmental issues. *See generally*, 25 C.F.R. Part 151.

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370, and its supporting regulations, 40 C.F.R. Parts 1500-1518, mandate that federal agencies consider the environmental impact of their decisions. NEPA requires that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action." 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3; *see Concerned Rosebud Area Citizens v. Babbitt and Gover*, 34 F. Supp. 2d 775 (D.D.C. 1999) (Section 81 approval is "major federal action" requiring Secretary's compliance with NEPA). It would be impossible for the Secretary to discharge her obligations under federal environmental law in the absence of any information concerning the "hypothetical parcel" to which the subject contracts pertained. *Mechoopda* at *19.

The fact that Section 81 is entirely silent as to how the Secretary might go about these enigmatic tasks in a vacuum of information about the unidentified parcel "indicates that Congress simply was not thinking in terms of" such an expanded definition of "Indian lands." *Rowland* at 207 (failure of Congress to address how courts are to determine the "inability to pay" standard applicable to artificial entities is

indicative of congressional intent to limit *in forma pauperis* status to natural persons).

In deciding whether a statute's contextual indicators should preempt application of the Dictionary Act's default rule, Justice Kennedy stated that it is "permissible to ask whether the broad Dictionary Act definition is compatible with a workable construction of the statute." *Rowland* at 212 (Kennedy, J., *dissenting*). Ignoring the contextual indicators and robotically applying the Act's default rule of construction would result in a totally unworkable construction of Section 81. Petitioner invites the regulatory nightmare that would surely ensue if Section 81 were to apply in the absence of identified or presently existing Indian lands. In such a circumstance, the Secretary could not make an informed judgment about whether to approve such a contract nor could she comply with her obligations under NEPA.

As the Ninth Circuit observed, "given these very practical concerns, it is no wonder that the Bureau's policy has been to review contracts under Section 81 only when they involve lands currently held in trust by the United States." *Guidiville*, Pet. App. 23.[17]

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[17] The NGV contracts would be reviewed by the Secretary as part of the fee-to-trust process under 25 C.F.R. Part 151 as to whether her discretion should be exercised in accepting the subject property in trust for the benefit of the petitioning tribe pursuant to 25 U.S.C. § 465. Under 25 C.F.R. § 151.11, the Secretary is authorized to undertake a comprehensive review "in evaluating tribal requests for the acquisition of lands in trust

(Continued on following page)

## B. Dictionary Act Does Not Apply To An Explicit And Unambiguous Statutory Definition

The Act is a "default" rule of construction which applies in the absence of a statute-specific definition.

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status when the land is located outside of and non-contiguous to the tribe's reservation . . . " During that process, "where the land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use." 25 C.F.R. § 151.11(c).

The interplay between § 81 and Part 151 is set forth in the Affidavit of Professor Kevin Gover, who served as Assistant Secretary for Indian Affairs under President Clinton, which the Ninth Circuit quoted with approval: "Gover attests that during his tenure from late 1997 to early 2001, 'it was not the [Bureau's] policy or practice to review contracts to determine whether such contracts fall within the scope of 25 U.S.C. § 81(b) . . . in the absence of the existence of trust lands.' Instead, in cases 'where the purpose of the contract between a developer and a tribe [was] to assist the tribe in acquiring real property, and petitioning the United States to accept title to such property in trust for the benefit of the tribe,' the Bureau's review would be done pursuant to the regulations implementing Section 465. As Gover put it: '[t]he Secretary's acceptance of title to the subject property in trust for the petitioning tribe subsumes all approvals required under Federal law.' " *Guidiville*, Pet. App. 23-24.

"The power of an administrative agency to administer a Congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) [citation omitted]. "[T]he courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) [citations omitted], unless that interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron* at 844.

*Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 470 (2002) (Stevens, J., *dissenting*).[18] The term "Indian lands," however, is specifically defined in the amended version of Section 81, a notable difference from the prior version which contained no definition. "[O]rdinary rules of construction would prefer the specific definition over the Dictionary Act's general one." *Rowland* at 200. No claim is made by Petitioner that Section 81's definition of Indian lands is ambiguous or that its literal interpretation would lead to "absurd results." *Id.*

Despite Petitioner's attempt to expand Section 81 beyond its literal meaning, it is clear that "the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart* at 450 [citations omitted]. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 461-62 [citations omitted].

"[T]he rules of construction contained in 1 U.S.C. § 1 are to be applied only 'where it is necessary to carry out the evident intent of the statute.'" *Sears, Roebuck v. Charles W. Sears Real Estate, Inc.*, 686

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[18] The *Barnhart* majority eschewed the dissent's resort to such default rules in construing the similarly explicit statutory definition at issue there. 534 U.S. at 461-62.

F. Supp. 385, 387 (N.D.N.Y. 1988), *quoting First Nat'l Bank v. Missouri*, 263 U.S. 640, 657 (1924). The "evident intent" behind Section 81, as amended, and its predecessor, is clear. Section 81 "is predicated upon the trust relationship between Indian Tribes and the federal government" and to extend the statute "to land that was not trust land 'would force the Secretary to exercise a trust responsibility with respect to lands over which Congress' has no trust obligation." *Forrest Associates v. Passamaquoddy Tribe*, 719 A. 2d 535, 539 (Me. 1998), *quoting Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 553 (1st Cir. 1997); *see also United States ex rel. Yellowtail v. Little Horn State Bank*, 828 F. Supp. 780, 787 (D. Mont. 1992) (government's only interest in overseeing certain land related agreements with Indians flows from its duty as trustee of existing tribal lands).

### C. Legislative History Supports Literal, Non-Expansive Interpretation of Section 81

Congress was undoubtedly aware of the case law applying Section 81 to contracts which related to *existing* Indian lands at the time of the March, 2000 amendment. Nothing in the legislative history[19]

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[19] While not strictly a part of the "context" of a congressional act under *Rowland's* analysis of the Dictionary Act, 506 U.S. at 199, legislative history is a time-honored tool of statutory construction. *See generally Guidiville*, Pet. App. 24 *et seq.*

suggests that Congress was broadening the statute to encompass contracts pertaining to non-existent, hypothetical future trust lands. In fact, the opposite is true as observed by the *Guidiville* majority in limiting its interpretation of the word "is" in Section 81 to its literal, present tense meaning. "Our literal reading of Section 81 is further corroborated by the statute's legislative history." *Guidiville*, Pet. App. 24. According to the Committee Reports, the amendment's "definition of Indian lands is intended to circumscribe the scope of this statute to those lands where title *is held* in trust for a tribe or a restraint on alienation *exists* as a result of the principle, dating from the Revolutionary War Era, that the federal government *must hold* title to Indian lands in furtherance of the federal-tribal trust relationship." 1999 Committee Reports, September 8, 1999, 106 S. Rpt. 150, p. 7 (1999). [Emphasis added.][20] "[C]ertainly, the most recent amendment to that statute makes clear that Congress now considers self-determination – not paternalism – to be in the Indians' best interests. And that goal is more directly advanced by a literal rather than a non-literal reading of Section 81." *Guidiville*, Pet. App. 27.

Clearly, if Congress had intended to expand the reach of Section 81 at the time of the amendment, "it

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[20] The Committee Reports note that the amendment "would reduce the number of contracts the department has to review each year [and] . . . would reduce costs for BIA. . . ." 106 S. Rpt. 150, p. 12 (1999).

could have used language more obviously targeted to addressing the temporal reach of that section," *Martin v. Hadix*, 527 U.S. 343, 354 (1999), and not merely relied upon the Dictionary Act. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) [citation omitted].

Petitioner has not given this Court sufficient reason to deviate from the wisdom of Oliver Wendell Holmes: "[T]here is no canon against using common sense in construing laws as saying what they obviously mean." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 63 (2004), *quoting Roschen v. Ward*, 279 U.S. 337, 339 (1929) (Holmes, J.).

In sum, the Act has no effect upon the interpretation of Section 81 with respect to the word "is" or the definition of "Indian lands." As the Ninth Circuit correctly concluded, there is no reason to resort to the "Dictionary Act's default rules of statutory construction [where] the context here clearly indicates that Section 81 is limited only to reviewing those contracts involving presently held trust lands." *Guidiville*, Pet. App. 24.

## CONCLUSION

Petitioner has not met its burden to establish any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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# REPLY BRIEF

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No. 08-655

# In the Supreme Court of the United States

HARRAH'S OPERATING COMPANY, INC.,
a Delaware corporation,
*Petitioner,*

v.

NGV GAMING, LTD.,
a Florida partnership,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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## REPLY IN SUPPORT OF CERTIORARI

An irreconcilable Circuit Split exists as a consequence of the Ninth Circuit's decision below and the Second Circuit's decision in *Catskill Development, LLC v. Park Place Entertainment Corp.*, 547 F.3d 115 (2nd Cir. 2008). The decisions of the Ninth and Second Circuits are directly in conflict with one another. Each case involved contracts that implicated Indian trust lands. Each case involved a requirement for federal agency approval for such contracts -- 25 U.S.C. § 81 ("Section 81") Secretary of the Interior approval in this case and 25 U.S.C. § 2711 ("Section 2711") National Indian Gaming Commission ("NIGC") approval in Catskill Development. Each involved a nearly identical statutory definition of "Indian lands." But the two Circuits expressly disagree on the role of the Dictionary Act, 1 U.S.C. §§ 1-8, in construing the definition of Indian lands.

Respondent's Brief in Opposition ("BIO") fails to overcome Petitioner's demonstration that the issues arising from the facts of this case warrant the Court's immediate review.[1] First, Respondent's argument fails to recognize the direct connection between Section 81 and Section 2711. Second, Respondent's attempt to downplay the Second

[1] Regrettably, Respondent's BIO is replete with irrelevant ad hominem attacks against Petitioner that are intended only to deflect the Court's attention from the genuine issues presented. Petitioner accepts neither the accuracy nor the validity of these attacks; however, Petitioner recognizes that this Reply is not the proper vehicle for responding to characterizations of this sort.

Circuit's express declaration that it disagreed with the Ninth Circuit's interpretation of Section 81 does not change the fact that a Circuit Split now exists. Third, Respondent's interpretation of the Dictionary Act would require this Court to reject its own well-established precedent.

### 1. Respondent Ignores the Close Relation Between Sections 81 and 2711.

As is explained in the Petition for Certiorari, both Section 81 and the Indian Gaming Regulatory Act ("IGRA"), of which Section 2711 is a part, contain virtually identical definitions of "Indian lands". Both Section 81 and Section 2711 require federal agency approval of contracts between Indian tribes and outsiders. Contrary to Respondent's suggestions, the approval processes of Sections 81 and 2711 are closely related, and the Ninth and Second Circuits opposing constructions of these statutes create an irreconcilable Circuit Split.

To explain, the mechanism of NIGC review and approval of Indian gaming management contracts under Section 2711 is simply an outsourced subspecies of Section 81 review and approval. Prior to IGRA's adoption, Indian gaming management contracts were reviewed and subject to approval by the Secretary of the Interior pursuant to Section 81. Indeed, in *California v. Cabazon Band of Mission Indians*, the Court specifically noted that, "[t]he Secretary has also exercised his authority to review tribal bingo management contracts under 25 U.S.C. § 81, and has issued detailed guidelines governing that review." 480 U.S. 202, 218 (1987). These Section 81 guidelines included detailed disclosure

requirements; procedures to avoid illegal tribal patronage, bribery and kickbacks; specified accounting and management procedures; and Federal Bureau of Investigation background checks. *Id.* at 202 n.22.

Congress enacted IGRA soon after Cabazon Band was decided; and the decision's holding influenced IGRA's legislative process. *See, e.g.*, S. Rep. No. 100-446, at 2-4 (1988) (discussing *Cabazon Band's* impact on IGRA's legislative process). The Senate Report specifically references the then-existing Section 81 review of gaming management contracts, noting that, in *Cabazon Band*, "[t]he Court relied heavily on the fact that the Department of the Interior, as trustee for Indian tribes, reviews tribal gaming ordinances and approves or disapproves them, as well as all joint venture and management contracts with outside firms." *Id.* at 3.

IGRA maintained Section 81 agency review and approval of gaming management while transferring the authority to conduct this review and approval from the Secretary of the Interior to the newly-created NIGC. This is reflected in the Act's text. IGRA states that "[f]ederal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts." 25 U.S.C. § 2701(2). By way of 25 U.S.C. § 2704(a), Congress established, "within the Department of the Interior" the NIGC.[2] Among the

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[2] Respondent's assertion that the NIGC "is outside of the jurisdiction of the Department of Interior", (BIO at 15), is incorrect. The NIGC is a subpart of the Department of the

NIGC's powers and duties is the NIGC Chair's authority to review and approve Indian gaming management contracts. 25 U.S.C. § 2711. The Act confirms that this management contract approval power is simply the Secretary's traditional Section 81 contract approval power, but transferred to the NIGC Chair: "The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission." 25 U.S.C. § 2711(h).

Under Section 2711(e), the NIGC Chair can disapprove a management contract for a number of reasons, including unlawful tribal patronage, false disclosures, potential links to organized crime, undue interference or influence on the part of the management contractor, and contractor malfeasance. 25 U.S.C. § 2711(e)(1)-(3). The NIGC Chair can also disapprove a management contract for reasons that "a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract." 25 U.S.C. § 2711(e)(4). These criteria are substantially similar to the management contract approval criteria the Secretary utilized under Section 81 before IGRA was enacted. *See Cabazon Band*, 480 U.S. at 202 n.22.

Accordingly, the processes for Secretarial contract review and approval under Section 81 and NIGC review and approval of gaming management

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Interior; indeed, the Secretary of the Interior appoints -- and can remove for neglect of duty, malfeasance or other good cause -- two of the NIGC's full-time members. 25 U.S.C. § 2704(b)(1)(B) and (b)(6).

contracts are quite similar. The fact that the Second Circuit and Ninth Circuit disagree about the interpretation of "Indian lands" in those two statutes is significant and the difference is irreconcilable as the scope of review between the two statutes is virtually indistinguishable.

**2. The Second Circuit Expressly Disagrees with the Ninth Circuit's Interpretation of Section 8.**

Contrary to Respondent's assertion, express disagreement between two Circuits does not indicate those Opinions are in "harmony." BIO at 13. The panel majority of the Ninth Circuit refused to apply the Dictionary Act when construing Section 81's use of "Indian lands" to encompass only "existing" Indian lands. By contrast, and in direct conflict with the Ninth Circuit panel majority, a panel of the Second Circuit unanimously concluded that "[t]he Dictionary Act, 1 U.S.C. § 1, instructs that '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise ... words used in the present tense include the future as well as the present.'" App.82. Therefore, the Second Circuit continued, "when construing the definition of 'Indian lands' in 25 U.S.C. § 2703(4), the Dictionary Act instructs us to read the words 'which is held in trust' to also include land that will be held in trust." *Id.* As support for this conclusion, the Second Circuit cited to the Ninth Circuit's dissent. *Id.*

While the Second Circuit observed that Section 81 and Section 2711 differ in that the former involves review of contracts that encumber Indian lands while the latter involves review of

management contracts, it nonetheless stated, "[t]o the extent these differences are not material to the Ninth Circuit's majority opinion, we nevertheless agree with Judge Smith's dissenting view that transactions involving land that 'will be' held in trust trigger the agency's review authority, especially where specific land to be taken into trust is identified in the operative agreements." App.82-83. As is explained in Section 1 *supra*, the differences between Section 81 and Section 2711 are not material; Section 2711 NIGC review is simply an outsourced form of pre-existing Section 81 review.

Respondent incorrectly argues "the Ninth Circuit applied the same rule of law adopted in Catskill in determining that the management contract between Petitioner and the Tribe was void for lack of NIGC approval, despite the absence of Indian lands." BIO at 13. Not only is the argument wrong, it is irrelevant.

First, the Ninth Circuit did not make any holding with respect to NIGC approval. The sole footnote Respondent cites in support of its argument immediately follows the Court's acknowledgement that the issue was not in dispute. App.10-11. ("The Tribe has itself recognized that its management contract with Harrah's (which would have imposed on it an indemnification obligation covering NGV's claims against Harrah's) was void under Section 2705(a)(4) due to the Tribe's failure to have obtained approval of the Chairman of the Gaming Commission.") Moreover, the accompanying footnote does not indicate how the Ninth Circuit would treat a contract under Section 2711 -- it merely notes that the Ninth Circuit did not evaluate NGV's contract

with the Tribe under Section 2705(a)(4). *Id.* ("Because the Tribe's agreement with Harrah's was subject to a different statutory provision from the section applicable to the Tribe's agreement with NGV, such Section 2705(a)(4) invalidity did not extend to the latter [the contract before the court]").

Second, regardless of the Ninth Circuit's position with respect to Section 2711, there is still an important and explicit Circuit Split with respect to Section 81 that warrants this Court's immediate attention. The Second Circuit unequivocally disagrees with the Ninth Circuit's interpretation of the definition of Indian lands in both Sections 81 and 2711-- which means a contract subject to Section 81 -- a contract that "encumbers" to-be-acquired Indian Lands -- requires Secretarial Approval in the Second Circuit in order to be valid, but does not require any type of review in the Ninth Circuit for validity. A disagreement between the Circuits as to the level of federal agency review required to validate the exact same contract necessitates an authoritative resolution from this Court.

In sum, an irreconcilable Circuit Split exists as a result of the Ninth Circuit's decision in this case and the Second Circuit's decision in Catskill Development. The Court should grant certiorari to resolve this conflict between the Circuits.

### 3. The Dictionary Act Supplies Default Rules that Apply to All Acts of Congress and Not Just Ambiguous Statutes

The Dictionary Act is a statute of general application. It is not a judge-made canon of statutory construction. The Dictionary Act's

application is not limited to ambiguous statutory language, and Respondent cites to no authority from this Court stating that it does.[3] Rather, by its express terms, 1 U.S.C. § 1 applies "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise ...." Instead, the Dictionary Act supplies default rules applicable throughout the United States Code unless the pertinent context indicates otherwise.

In *Wilson v. Omaha Tribe*, 442 U.S. 653 (1979), the Court resorted to the Dictionary Act when interpreting a 145-year old statute that used the term "white person". *Id.* (construing 25 U.S.C. § 194). While the statutory phase "white person" is anachronistic, it is hardly ambiguous. Nevertheless, in *Omaha Tribe*, the Court used the Dictionary Act to construe the unambiguous phrase "white person" to mean "artificial persons" consistent with 1 U.S.C. § 1's definition of person to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals ...." 442 U.S. at 665-66.

Concordantly, in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), the Court was asked to construe the term "vessel" as it used in the Longshoreman and Harbor Workers' Compensation Act ("LHWCA). *See* 33 U.S.C. § 902(3)(G). While the term "vessel" is not ambiguous, the Court defined "vessel" by reference to the Dictionary Act's definition of "vessel", as including "every description of water-craft or other artificial contrivance used, or

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[3] The Court's opinion in *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002) does not even mention the Dictionary Act.

capable of being used, as a means of transportation on water." *Id.* at 490-91 (citing and quoting 1 U.S.C. § 3). As the Court observed, the Dictionary Act "continues to supply the default definition of 'vessel' throughout the U.S. Code 'unless the context indicates otherwise.'" *Id.* at 490 (quoting 1 U.S.C. § 1).

The Court's own cases, therefore, confirm the Dictionary Act's function, i.e., to provide default rules of statutory construction for all Acts of Congress "unless the context indicates otherwise." The Court's construction of the Dictionary Act avoids the exceedingly cumbersome requirement of specifying in each Act of Congress *e.g.*: (1) whether the singular imports the plural and vice versa, 1 U.S.C. § 1; (2) whether "vessel" includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water, 1 U.S.C. § 3; and (3) whether "words used in the present tense include the future as well as the present." 1 U.S.C. § 1.[4]

Accordingly, and as the panel dissent correctly observed, the Ninth Circuit panel majority's unsupported conclusion that the Dictionary Act only applies to ambiguous statutes -- which Respondent repeats in its BIO -- is directly contrary to the Dictionary Act's express terms, and is erroneous. Rather, "[n]othing in the United States Code or controlling precedent limits the Dictionary Act's

[4] Or to expand upon the point: (4) whether the masculine gender includes the feminine, *id.*; (5) whether "county" includes a parish or equivalent government subdivision, 1 U.S.C. § 2; and (6) whether "vehicle" includes all means of land transportation, 1 U.S.C. § 4.

application" to ambiguous statutory language. App.38.

## CONCLUSION

The decisions of the Ninth and Second Circuits are irreconcilably in conflict with one another. Their competing constructions of "Indian lands" cannot be harmonized. Nor can their contrasting approaches to applying the presumptive rules of the Dictionary Act be reconciled in a principled manner. Lastly, the Ninth Circuit panel majority's constructions of 1 U.S.C. § 1 and 25 U.S.C. § 81 are simply incorrect and contrary to the broad and protective purposes behind these enactments. Indeed, the Ninth Circuit panel majority's decision extends an open invitation to unscrupulous developers to evade federal agency review and take advantage of Indian tribes by consciously entering into contracts that encumber or impinge Indian lands that have not been acquired as of the date of contract execution, but which of necessity need to be acquired to fulfill the contractual purposes.

Petitioner respectfully submits that the petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

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